SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, APPELLANT,

vs.

STANDARD OIL COMPANY OF NEW JERSEY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

In Equity. No. 3312

STANDARD OIL COMPANY OF NEW JERSEY, a Corporation Created under the Laws of the State of Delaware, Plaintiff,

vs.

FRED L. FOX, in His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia, Defendant

BILL OF COMPLAINT—Filed June 29, 1933

To the Honorable George W. McClintic, Judge of Said Court.

Plaintiff, Standard Oil Company of New Jersey, a corporation, brings this its bill of complaint against Fred L. Fox, in his individual right and in his official capacity as [fol. 3] the Tax Commissioner of the State of West Virginia, and thereupon complains and says:

I

Plaintiff is a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, and is now and was at all times hereinafter mentioned a citizen and resident of said state, having its principal office in the City of New York and State of New York. Plaintiff is chiefly engaged in the business of refining, transporting and distributing at wholesale and retail in various states of the Union, including the State of West Virginia, gasoline, kerosene, oils, greases and divers other petroleum products. Plaintiff has complied with all the laws of the State of West Virginia relating to foreign corporations, and is duly authorized to do and transact business and to own and hold real and personal property in said state, its principal office

and place of business therein being located in the City of Charleston, Kanawha County, in the Southern District of said state.

II

Defendant Fred L. Fox is the duly and legally appointed and qualified Tax Commissioner of the State of West Virginia, is a citizen thereof, and resides, and has his office in said City of Charleston, in Kanawha County, and in said Southern District of West Virginia. Said Tax Commissioner is charged with the duty of administering and enforcing all the tax laws of said state, including specifically the administration and enforcement of an Act of the Legislature of West Virginia, passed at a regular session thereof on March 8, 1933, known as House Bill No. 112, and effective from the date of passage. It is particularly [fol. 4] the duty of said Tax Commissioner to prescribe forms and applications and assessments under said Act, and to adopt and promulgate all necessary and needful rules and regulations for ascertaining and assessing the tax thereby imposed; and the said Act makes it the duty of said Tax Commissioner to collect such tax, and to pay the same monthly into the State Treasury.

III

This is a suit in equity, of which this Court has original jurisdiction. Equitable jurisdicton is claimed for the reason that the plaintiff is threatened with imminent and irreparable injury, loss and damage, and is without an adequate and complete remedy at law therefor.

IV

The grounds upon which the jurisdiction of this Court depends are as follows:

(a) This suit arises under the laws and Constitution of the United States, for the reason that the plaintiff asserts, alleges and claims that the enforcement against it by the defendant of said Act of the Legislature, herein referred to as House Bill No. 112, in the various particulars hereinafter set out, is violative of Section One of the Fourteenth Amendment to the Constitution of the United States, in that the enforcement of said statute would deprive the

plaintiff of its property without due process of law, and deny to it the equal protection of the laws.

(b) The plaintiff and defendant are, respectively, citizens of different states, as hereinbefore shown.

(c) The matter in controversy exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00).

[fol. 5]

V

This suit is brought for the purpose of enjoining and restraining the enforcement, operation and execution against the plaintiff of the provisions of said House Bill No. 112, and specifically to enjoin the defendant in his individual right and/or as Tax Commissioner from paying into the State Treasury under color of the provisions of said statute, money heretofore paid by plaintiff to said Tax Commissioner under protest and duress, all as hereinafter more particularly set forth. A true copy of said House Bill No. 112, which is entitled

"An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof,"

is filed herewith as an integral part of this bill of complaint, marked "Plaintiff's Exhibit A".

VI

Defendant Tax Commissioner, acting under color of the authority of said Act, has prescribed a form of application for licenses thereunder, has promulgated and attempted to put in force, and has notified the plaintiff of certain rules and regulations deemed necessary by him to ascertain and assess the tax imposed by said Act, a printed copy of which application, rules and regulations, marked "Plaintiff's Exhibit B", is attached hereto and is made a part of this bill of complaint. In addition to certain oral rulings and directions to the attorneys and representatives of plaintiff, as hereinafter set forth, defendant Tax Commissioner has [fol. 6] issued and circulated throughout the state a written

order bearing date June 5, 1933, wherein said defendant notified the operators of all "stores" and "mercantile establishments" that he had fixed a definite time limit of seven days from the date of said order within which applications for licenses were required to be filed, and that failure to comply with such order by any one subject thereto would render such person subject to the penalties imposed by section 9 of said Act. A true copy of said order, marked "Plaintiff's Exhibit C", is attached hereto and made a part of this bill of complaint.

VII

Defendant Tax Commissioner in and by his said forms, rules and regulations, so adopted and promulgated, copies of which were forwarded by said defendant to the plaintiff through the United States Mails, and by oral rulings and directions to the plaintiff and its attorneys and representatives, has declared that said Act imposes license fees or taxes upon the plaintiff for the privilege of owning, operating, maintaining and/or controlling its gasoline filling stations and bulk distributing plants in the State of West Virginia, according to the schedule of fees prescribed by section 5 of said Act. Said defendant, by said rules and regulations and by said oral directions to the plaintiff and its attorneys and representatives, has further ruled and declared that (1) each and every filling station in said state owned or leased by the plaintiff and operated by it, and (2) each and every vending place or place of business where the plaintiff, by virtue of contractual relations with the owners or persons in control of the premises, has the exclusive right or privilege of furnishing the petroleum products distributed at wholesale or retail therefrom, is a "store" or "mercantile establishment" owned, operated, maintained and/or controlled by the plaintiff within the mean- [fol. 7] ing of said Act, and that said Act imposes license taxes or fees upon the plaintiff, according to the schedule of charges therein contained.

Defendant Tax Commissioner on or about the 29th day of May, 1933, advised and directed the attorneys and representatives of the plaintiff that he, as Tax Commissioner, had no authority or power to waive the liability of the plaintiff to the fines and penalties fixed by said House Bill No. 112 or to stay the enforcement of such provisions pend-

ing the outcome of a suit to determine the tax liability of the plaintiff thereunder. Defendant further advised and directed the attorneys and representatives of the plaintiff that unless the plaintiff immediately filed application for licenses and paid the license taxes or fees as set out in said schedule upon each and every filling station, bulk distributing plant, and place of business, as aforesaid, it would render itself subject to the penalties and fines provided in said Act for the continued violation thereof. Plaintiff avers that pursuant to the directions, rulings and commands of said Tax Commissioner, as aforesaid, the plaintiff on June 6, 1933, filed its application for licenses for one thousand three locations in said state, together with its letter stating that said House Bill No. 112 imposed no liability for license taxes or fees whatever upon the Standard Oil Company of New Jersey, the plaintiff herein; that no language in the printed form of application for licenses filed by it should be deemed an admission of liability therefor; that the sole purpose of filing said application and of paying the license taxes or fees under said Act was to avoid the imposition of fines and penalties upon said company in the event that the validity and application of said House Bill No. 112 should be sustained; that no license taxes or fees were due from plaintiff thereunder, and that the payment of the tax was made under protest and duress. In order to avoid the [fol. 8] imposition of said fines and penalties and in conformity with section 11 of said Act, plaintiff then and there paid to the said Tax Commissioner under protest and duress, as aforesaid, the sum of Two Hundred Forty Thousand One Hundred Seventy-Three Dollars and Fifty Cents ($240,173.50), that being the amount claimed by said Tax Commissioner to be due from the plaintiff under said Act, and demanded by him.

Plaintiff says that said Act purports to declare unlawful the operation, maintenance, opening or establishing of any "store" or "mercantile establishment" in said state without first obtaining a license therefor from the Tax Commissioner. Said Act further provides that a violation thereof shall constitute a misdemeanor, and any person, firm or corporation violating any of the provisions of said Act, upon conviction, shall be fined not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00), and that each and every day during the continu-

ance of such violation shall constitute a separate and distinct offense. Plaintiff says that under said Tax Commissioner's interpretation and application of said Act to the operation of gasoline filling stations, bulk distributing plants, and other places of business, as aforesaid, plaintiff was subject potentially to a maximum penalty of over One Hundred Thousand Dollars ($100,000.00) per day for the alleged continued violation of said Act by it. Plaintiff further says that the said tax was paid involuntarily and under duress, as well as under said written protest, in order that the operation of said filling stations, bulk distributing plants, and other places of business might be continued unmolested and free from the imposition of said excessive fines and penalties.

[fol. 9] Plaintiff further says that unless the temporary restraining order herein prayed for is granted, said money so paid by it under protest will be paid over by said Tax Commissioner into the State Treasury on July 1, 1933, all pursuant to the requirements of said House Bill No. 112, as declared and asserted by the defendant.

A true copy of the said application, together with supporting schedules, and a true copy of plaintiff's said letter of protest accompanying the same, as filed with the defendant Tax Commissioner, as aforesaid, and a true copy of the defendant Tax Commissioner's written acknowledgment thereof, marked "Plaintiff's Exhibit D," is filed herewith as an integral part of this bill of complaint.

VIII

The plaintiff is authorized to transact the business of refining, transporting, and distributing petroleum products in seven states, including the State of West Virginia, and also in the District of Columbia. Said business is carried on through a branch office in each of said states and in the District of Columbia, and the territorial boundaries for the operations of such branch offices correspond approximately to the boundaries of said governmental subdivisions in which the same are respectively located. The branch office at Charleston, Kanawha County, in said state, is one of eight such offices maintained by the plaintiff. The plaintiff was incorporated under the laws of the State of Delaware on August 29, 1927, and thereupon acquired the business, property rights and good will of the Standard Oil

Company, a corporation of the State of New Jersey. The said Standard Oil Company, a corporation of the State of New Jersey, and the plaintiff have successively engaged in [fol. 10] said business for many years, as will be hereinafter more fully set forth.

The principal office of the plaintiff is located in New York City. The president and all other executive officers, including the board of directors and legal staff, have their offices and perform their regular duties in said city. The general business policies and methods are determined at said principal office, and from there appropriate orders and directions as to the general conduct of the business of the plaintiff are forwarded to the various branches in the several states.

The largest refinery of the plaintiff is situate in and near Bayway in the State of New Jersey. A large part of its petroleum products is manufactured and refined at said plant. The plaintiff owns and operates certain other refining plants, including its plant at Parkersburg, Wood County, West Virginia.

In recent years, the major business of the plaintiff has been the refining and distributing of fuels and lubricants for the various types of motor vehicles, and the energies and skill of its officers and employees have been largely directed to the promotion and devolopment of that phase of its business. To this end, the plaintiff has acquired and now owns a large number of bulk distributing plants, and operates numerous service stations, including those in the State of West Virginia.

IX

Plaintiff, or its said predecessor company, has been engaged for more than forty years in the business of refining, transporting, and distributing petroleum products in the [fol. 11] State of West Virginia. Since 1892, a large part of such petroleum products, including kerosene, gasoline, oils and greases, has been manufactured and refined at said Parkersburg plant and distributed from said plant to various bulk distributing stations throughout the state. A portion of such petroleum products distributed and sold in West Virginia is refined in the States of Maryland and New Jersey, and thence transported to its various bulk

distribution plants within the State of West Virginia. In the year 1932, approximately sixty-four percent of all petroleum products distributed within said state by the plaintiff was refined or manufactured at said Parkersburg plant.

Plaintiff also has had for sale during the past three years at its said service stations in the State of West Virginia a limited variety of accessories and supplies, including tires, inner tubes, storage batteries, and other incidental and inexpensive repair and replacement parts, in order to render more adequate service to the travelling public at said stations. Such accessories and supplies are purchased through the central purchasing department of the plaintiff in New York City and delivered upon requisition to various bulk distributing plants within the state.

The plaintiff manages and supervises all of the business carried on within forty-five of the counties of the state from its West Virginia Branch Office, located in Charleston, West Virginia. The business conducted by plaintiff in ten counties of the state is managed and supervised in like manner from the branch office of the plaintiff located in Baltimore, Maryland. A small part of the business carried on in the extreme southern portion of the state is managed and supervised from the branch office of the company, located in Richmond, Virginia. The records and books of account re-
[fol. 12] lating to the business of each said branch are kept and maintained at the respective branch offices.

The volume of business done in West Virginia is evidenced by the following classified statement of gross revenue for the years 1930, 1931 and 1932:

(See Table on fol. 13.)

[fol. 13]

Classified Statement of Gross Revenue for the State of West Virginia

	1930		1931		1932	
	Gallons	Gross revenue	Gallons	Gross revenue	Gallons	Gross revenue
1. Petroleum Products:						
a. Motor Fuels & Kerosene	67,001,990	$11,978,828.01	63,615,881.1	$9,759,197.79	51,424,265	$8,312,710.71
b. Lubricating Oils & Greases	6,210,917.2	2,303,626.34	5,046,375.1	1,855,412.14	3,441,627.4	1,310,389.74
c. Fuel and Gas Oil	825,084.4	52,635.18	664,752.1	40,863.60	409,096.5	20,631.77
d. Asphalt	5,345,484	325,580.80	4,957,452.8	226,194.91	5,765,435.7	133,987.22
Total petroleum products	79,383,475.6	$14,660,670.33	74,284,461.1	$11,881,668.44	61,040,424.6	$9,777,719.44
2. Tires and Tubes	.....	125,318.94	.....	500,516.00	.....	299,084.85
3. Batteries	.....	.....	.....	.....	.....	14,491.95
4. Automobile services	.....	1,869.69	.....	2,247.32	.....	49,869.39
5. Miscellaneous products and accessories	.....	114,179.76	.....	137,013.63	.....	57,287.69
Total gross revenue	.....	$14,902,038.72		$12,521,445.39		$10,198,453.32

[fol. 14] X

The products of the plaintiff are distributed and sold to the consuming public from five classes of outlets and vending places, as follows:

(1) Service or filling stations owned or leased by the plaintiff and operated by it.

(2) Bulk distributing plants operated primarily as supply depots or warehouses, but from some of which products are sold at wholesale and/or retail.

(3) Service stations leased to the plaintiff and operated by lessor or other person in control of premises under commission contracts made with plaintiff, hereinafter called "leased outlets."

(4) Vending privilege outlets at which plaintiff acquires by lease the right to store and sell it- products and which are operated by the lessor or other person in control under commission contracts.

(5) Service stations and vending places owned and operated by independent dealers.

The historical development and description of these five classes of outlets are set forth in the following paragraphs.

Prior to the year 1922, the predecessor company of the plaintiff distributed petroleum products only from bulk distributing plants or supply depots, located in various sections of said state, deliveries being made to various persons and firms engaged in the business of selling such products to the public, and to other persons and firms who consumed relatively large quantities of such products in the carrying on of their businesses. A number of the persons purchasing petroleum products for resale were operators of automobile service or filling stations.

[fol. 15] (1) Service or Filling Stations Owned or Leased by Plaintiff and Operated by It

Beginning with the year 1922, the State of West Virginia entered upon a vast program of highway construction, extending to and connecting each of the county seats of said state. The use of motor vehicles for the transportation of persons and of freight increased rapidly with the improvement of the urban and interurban highway system. Largely

because of such wide use of the roads, the plaintiff has provided for the convenient and efficient refueling and servicing of motor vehicles at numerous places in the important centers of population and at various points on the principal thoroughfares connecting such population centers. In order adequately to furnish such service and to meet the competition of other oil companies similar in character to the plaintiff and doing business along the same general lines, numerous service stations in certain of the cities and towns in said state have been built, purchased, acquired, or leased since said year 1922 by the plaintiff and its said predecessor company, which service stations the plaintiff has operated and now operates principally for the purpose of supplying gasoline, oils and greases to the operators of motor vehicles. The number of such service stations, so owned or leased and operated within said state at the end of each year from 1922 to and including the year 1932, is as follows:

December 31, 1922— 6.
" " 1923—11.
" " 1924—18.
" " 1925—31.
" " 1926—48.
" " 1927—65.
" " 1928—73.

[fol. 16]

December 31, 1929— 93.
" " 1930—106.
" " 1931—108.
" " 1932—106.

At the time of the filing of said application with the defendant Tax Commissioner, the number of such service stations operated by the plaintiff was one hundred one (101).

A typical service or filling station owned or leased by the plaintiff and operated by it, consists of a parcel of land, upon which there has been laid a concrete surface, situate generally on a main thoroughfare. A small building, usually not larger than twenty feet square, is constructed thereon. There are installed at each such station an automatic lift or a pit for the greasing and oiling of motor vehicles, two or more underground tanks for the storage of gasoline, upright pumps for the vending of gasoline, an air

compressor and air connections for the inflation of tires, oil and grease tanks, water services, and incidental apparatus for the greasing and oiling of cars and the repair of tires. The building at such stations customarily houses a cash register, toilet facilities, a small stock of tires, batteries, spark plugs, windshield wiper blades, and a limited variety of incidental automobile accessories and supplies. At four service stations in the more populous centers of the state larger buildings are maintained and operated, with additional facilities for the more adequate and convenient greasing and oiling of motor vehicles. Such larger stations render a complete and highly specialized lubricating service. All stations are uniform in their general appearance, design, and color scheme, and special emphasis is laid on the rendition of standardized personal service to all patrons. [fol. 17] The said stations are operated by employees of the plaintiff. At a majority of the stations the employees are paid salaries, but the employees at a smaller number of stations receive compensation in the form of commissions based upon the volume of sales made by them.

The records of the plaintiff for the past three years show that more than ninety-five per cent of the gross revenue at all such service stations has come from the distribution of petroleum products, and a very small percentage covers all sales of miscellaneous automobile accessories and supplies.

(2) Bulk or Distributing Plants

The plaintiff operates a number of bulk distributing stations in said state, which are maintained principally as supply depots for the storage of petroleum products and for the distribution of such products to the various service stations of the plaintiff and others, to dealers handling the products of the plaintiff, and to commercial and industrial consumers throughout the state. A large quantity of petroleum products is sold at wholesale and retail by salesmen of the plaintiff who canvass the trade in all sections of the state, and the deliveries of products so sold are made from such bulk stations. A relatively small quantity of petroleum products is sold on the bulk station premises.

A typical bulk plant consists of two or more metal tanks of the capacity of from 10,000 to 20,000 gallons each, a side track for the unloading of tank cars, a warehouse for the storage of oils, greases and, in certain instances, tires and

other incidental accessories, an office room for the keeping of inventory and sales records, and a parking place for tank trucks. At twenty-four bulk plants, located in the larger cities and towns of the state, storage and warehouse facili- [fol. 18] ties are maintained for handling substantial quantities of petroleum products, and at each such plant an employee of the plaintiff is on duty at all times during working hours in charge of the plant and records. At each of the remaining bulk plants, the smaller volume of products handled requires the presence of an employee in charge only a portion of the time; in certain of such cases, one employee can and does perform the necessary duties at several plants consecutively. At certain of these small bulk plants, the employee in charge is also the driver of a tank truck which delivers the petroleum products of the plaintiff to the various types of stations and outlets described herein, to the independent dealers, and to commercial and industrial buyers. At the date of filing the application herein referred to, there were fifty-four bulk plants of the plaintiff in said state. The records of the plaintiff show that the distribution of petroleum products constitutes the principal business at such bulk distributing plants.

(3) Leased Outlets

The plaintiff has had contractual relations with numerous owners and persons in control of service stations, pursuant to which the petroleum products of the plaintiff are handled at said stations. Since the year 1930, the character of the contractual relationship has varied from time to time, but at the effective date of said House Bill No. 112, there existed a lease of each such service station and premises to the plaintiff for a fixed term. Each such lease provided for a monthly rental to the lessor therein measured at a fixed flat rate for each gallon of motor fuels distributed from the leased premises. There was in effect also as to each leasehold a separate agreement by the terms whereof plaintiff's lessor or some other person named therein undertook [fol. 19] to act as the agent of the plaintiff at such service station in the handling of petroleum products. By said agreement such agent was to receive a fixed commission on the petroleum products distributed therefrom. It customarily has been provided that the agency relationship could be terminated by either party thereto upon three

days' notice in writing to the other. The application filed with defendant Tax Commissioner, and exhibited herewith, shows that the plaintiff had contractual relations with the owners or those in control of 388 such service stations in the State of West Virginia. Copies of the forms of lease and agency agreements pursuant to which the plaintiff's products were sold through stations brought under that form of operation effective on March 8, 1933, are filed herewith as a part of this bill of complaint, marked "Plaintiff's Exhibit E" and "Plaintiff's Exhibit F", respectively.

(4) Vending Privilege Outlets

The plaintiff, during the same period, also entered into contractual relations with the owners or persons in control of stores, garages, lunch stands and other establishments, providing for the maintenance and use at such places of tanks and vending equipment for the distribution by said owners or persons of the petroleum products refined by the plaintiff. There is no difference in the method of handling products of the plaintiff at vending privilege outlets and at said leased outlets. The relationship between the plaintiff and the operators of both types of outlets is identical, except that the operators of the vending privilege outlets have vested in the plaintiff only certain storage and vending privileges for the handling of its petroleum products on the premises. At every such vending privilege outlet, the distribution of the petroleum products of the plaintiff is incidental to the principal independent business carried on at [fol. 20] such place by the owner or other person in control thereof. The application filed with defendant Tax Commissioner, and exhibited herewith, shows that the plaintiff had effective vending privilege agreements with the owners or those in control of 460 vending places in the State of West Virginia. Copies of the forms of vending privilege agreements pursuant to which the said vending privilege outlets were operated on March 8, 1933, are filed herewith as a part of this bill of complaint, marked "Plaintiff's Exhibit G" and "Plaintiff's Exhibit H", respectively.

The interest of the plaintiff in such vending places lies in the distribution of its petroleum products therefrom, although other independent types of business are conducted on the premises.

(5) Independent Dealers

At the present time, five hundred and fifty-seven independent dealers, who operate service stations, stores, and vending places throughout the State of West Virginia, purchase petroleum products from the plaintiff for the servicing of motor vehicles. Many of such independent dealers handle the petroleum products of several of the major oil companies. Petroleum products of the same quality and type, and bearing the same distinctive labels and brands as those distributed by the plaintiff, are delivered by the plaintiff to such dealers at the same prices charged the operators of leased outlets under their contracts with the plaintiff. Plaintiff actively solicits the business of such independent dealers. In order to develop, promote and enlarge the purchases by independent dealers, plaintiff lends to such dealers its vending equipment, tanks, and advertising signs, and in many instances installs such [fol. 21] equipmet on their respective premises without cost to such dealers. In some cases the plaintiff charges the dealers the actual cost of the labor expended in such installation. Many independent dealers are financially unable to purchase the vending equipment necessary to engage in the business of handling petroleum products, and the policy of the plaintiff in lending the necessary equipment has substantially increased the number of independent dealers handling plaintiff's products during the period from 1922 to 1933.

XI

Plaintiff at all times has paid all ad valorem, property, privilege, license, franchise and special taxes on every kind assessed and levied against it by the State of West Virginia and by the political subdivisions thereof, as follows:

(1) An annual license tax, payable to the State of West Virginia, imposed under the provisions of sections 69 and 71, Article 12, Chapter 11, Code of West Virginia, upon the charter of every domestic corporation and upon every foreign corporation holding property or doing business in said state, the rates upon foreign corporations being fifty per cent greater than upon domestic corporations.

(2) A business and occupation tax, payable to the State of West Virginia, imposed annually as a privilege tax on account of certain specified business activities under the

provisions of section 2, Article 13, Chapter 11, Code of West Virginia, the following subsections being applicable to plaintiff: (b) upon every person engaged within the state in the business of manufacturing, compounding, or preparing for sale any article, substance or commodity a tax at the rate of twenty-one one-hundredths of one per cent [fol. 22] of the gross proceeds derived from the sale thereof; (c) upon every person engaging or continuing within the state in the business of selling any tangible property as a retailer a tax equivalent to two-tenths of one per cent of the gross income of the business, and upon every wholesaler a tax equal to one-twentieth of one per cent of the gross income of the business. In order to raise additional revenue to meet the pressing needs of government, the Legislature of West Virginia passed an act (Committee Substitute for Senate Bill No. 1) on May 26, 1933, effective from passage, which raised the business and occupation tax rates applicable to plaintiff (1) on its business of refining and preparing for sale petroleum products from twenty-one one-hundredths of one per cent of the gross proceeds of sale to three-tenths of one per cent, an increase of nine-hundredths of one per cent, (2) on the business of selling tangible property at retail from two-tenths of one per cent of the gross income of the business to three-fourths of one per cent, an increase of fifty-five one-hundredths of one per cent or over three and one-half times the rate in effect for the year 1932, and (3) on the business of selling tangible property at wholesale from one-twentieth of one per cent of the gross income of the business to fifteen one-hundredths of one per cent, an increase of one-tenth of one per cent or three times the effective rate for the year 1932.

(3) The annual license tax, payable to the State of West Virginia, imposed under the provisions of sections 2 and 3, Article 14, Chapter 11, Code of West Virginia, upon every filling station or place of business from which gasoline is sold at retail, one dollar, and every distributing station from which gasoline is sold for resale or distribution or at which gasoline is produced, refined or compounded, five dollars, for the privilege of so dealing, such privilege being granted conditionally upon the licensee paying in addition the special excise or privilege tax im- [fol. 23] posed by section 3 of said article and chapter, based upon the quantities of gasoline sold, purchased or

used in the state and equivalent to four (4) cents per gallon thereof. Plaintiff has paid to the State of West Virginia annually said license tax, measured at flat rates by the quantity of gasoline sold, purchased, or used, and by the number of filling stations, distributing stations, and other places of business at which plaintiff's petroleum products are exclusively distributed.

(4) License and permit fees on motor vehicles, payable to the State of West Virginia, imposed annually under the provisions of Article 6, Chapter 17, Code of West Virginia.

(5) Property taxes paid to said State, and to the various political subdivisions thereof.

(6) License fees paid to municipalities.

(7) License fees for dispensing alcohol paid to the State of West Virginia.

The following schedule shows the total amount of all such taxes and license fees paid to said State and its political subdivisions, and the ratio of taxes to gross revenues for the years 1930, 1931 and 1932.

[fol. 24] Taxes and License Fees

	1930	1931	1932
1. Corporate License Tax paid to State of West Virginia	$932.77	$883.05	$1,032.45
2. Business and Occupation Tax paid to State of West Virginia	$19,350.03	$20,393.10	$14,579.94
3. License tax on filling stations and bulk distributing stations paid to State of West Virginia, measured at flat rates upon each such place and upon the quantities of gasoline sold, purchased or used	$2,560,558.68	$2,283,268.13	$1,818,476.84
4. License and Permit Fees on Motor Vehicles paid to State of West Virginia and Municipalities	$10,965.73	$9,610.92	$9,966.41
5. Property Taxes paid to State of West Virginia, Counties and Municipalities thereof	$124,963.23	$124,038.55	$118,764.43
6. License Fees paid to municipalities	$200.50	$200.50	$200.50
7. License Fees for dispensing alcohol paid to State of West Virginia	$248.00	$275.00	$242.00
Total taxes and license fees paid	$2,717,218.04	$2,438,669.25	$1,963,262.57
Ratio of taxes to gross revenue for each year	18.2%	19.4%	19.2%

The plaintiff avers, upon information and belief, that the ratio of the total of all taxes and license fees paid by the plaintiff to the gross revenue for the year 1932, as shown above, will not be diminished for the year 1933, and, by adjusting the total of 1932 taxes and fees paid by the plaintiff so as to include the license taxes and fees under said [fol. 25] House Bill No. 112, the ratio of all such taxes, so adjusted, to the gross revenue for said year, expressed in percentage, would be 21.6 per cent, and the plaintiff is advised and therefore charges that the percentage of all such taxes and fees, as adjusted, to the gross income for 1933 will not be less than in 1932. The ratio between the taxes and fees sought to be imposed upon the plaintiff under said House Bill No. 112 and the gross revenue for 1932 is 2.32 per cent. Plaintiff alleges that such an undue and unreasonable exaction of, and burden upon, its earnings amount to a confiscation and a taking of its properties in violation of the inhibitions of the Constitution of the United States and of the State of West Virginia.

The maximum license tax attempted to be imposed by the defendant Tax Commissioner upon any "store" of the plaintiff under said House Bill No. 112, together with the license filing fee of Fifty Cents, is Two Hundred Fifty Dollars and Fifty Cents. At the effective date of said Act, the average license tax and filing fee thereunder as applied to plaintiff by Defendant Tax Commissioner upon each of the service stations and bulk distributing plants of the plaintiff, and upon each leased outlet and vending privilege outlet, is approximately Two Hundred Forty Dollars.

Plaintiff avers that the volume of its business as a whole and at each of its bulk distributing plants, service stations, and leased outlets and vending privilege outlets, has materially and successively decreased during the years 1930, 1931, and 1932, and such volume for the first five months of the year 1933 was substantially less than during the corresponding months of the year 1932; that a substantial number of service stations owned or leased by it show a net operating loss per station for the year 1932 and for the [fol. 26] first five months of the year 1933; that in the case of many such stations the average license tax of Two Hundred Forty Dollars, under the application of said House Bill No. 112 to the plaintiff by defendant Tax Commis-

sioner, is equal to or in excess of fifty per cent of the average net operating income per station for the year 1932; and that if the tax herein complained of be sustained as against the plaintiff, the loss which will be incurred as a result of said tax for the year 1933 will amount to a substantial confiscation of the capital and assets of the plaintiff.

Plaintiff says that its net operating revenue for the year 1932 as many of the leased outlets and vending privilege outlets was less than the average chain store tax of Two Hundred Forty Dollars per year sought to be imposed upon each such outlet by defendant Tax Commissioner; and that the imposition of said license tax upon the operation of such outlets, in addition to all other taxes and license fees assessed and paid, will force the plaintiff to cancel many of the leases and agreements, otherwise constituting valuable and profitable rights of the plaintiff, all of which will be destructive and confiscatory of such property and property rights.

In addition to said leases and agrements covering the leased outlets and vending privilege outlets, the plaintiff has acquired other valuable properties and property rights in building up its business in the state, including many parcels of real estate, together with valuable buildings constructed upon certain of said parcels, personal property, and leases of property, some of which are for long terms. The net book value of all the property of the plaintiff, both real and personal, situate in this state, is materially in excess of six million dollars. Plaintiff also has good will of great value and an efficient and trained operating personnel. [fol. 27] Plaintiff says that the operation and execution of said House Bill No. 112 will impair and in large measure destroy the value of such property and/or property rights.

The products of the plaintiff sold in the state are of uniform quality and of high standard of excellence. The service stations, owned or leased and operated by plaintiff, as well as the leased outlets hereinbefore referred to, are located at places convenient to motorists. They are easily recognizable as places where products of the plaintiff are distributed. In all such service stations and leased outlets the essential and primary business carried on is the distribution of petroleum products and the servicing of motor vehicles. The effect and operation of said House Bill No. 112, as applied to the plaintiff and to other oil companies

similarly situated, if there be such, will be to curtail greatly the number of such outlets and service stations to the great injury of the plaintiff and to the inconvenience of the motoring public.

XII

Plaintiff says that for many years prior to the advent of the modern gasoline filling station, plaintiff and its predecessor company, successively, were engaged in the refining, manufacturing and distribution of petroleum products. In this activity plaintiff or its predecessor company sold petroleum products to local garage owners, to independent wholesale and retail dealers and to commercial and industrial consumers. The entrance of plaintiff and other companies engaged in like business into the distribution of petroleum products through company-operated service stations and through said contract outlets so far as plaintiff is advised, has not resulted in the displacement of independent local owners and operators of service stations. As [fol. 28] hereinbefore stated, the wide ownership of motor vehicles and the construction of modern highways have been the moving cause for the establishment of numerous places for the refueling and servicing of such vehicles. The petroleum products of the plaintiff are distributed at 848 leased outlets and vending privilege outlets in addition to its own service stations, as well as through 557 independent dealers whose patronage is actively solicited by plaintiff, as aforesaid. Many independent merchants handle the products of other oil companies together with those of the plaintiff. Plaintiff avers that in the operation of its 101 service stations and in the operation of said 848 outlets, the 557 independent local dealers have been placed at no disadvantage whatsoever as to price, quality, or quantity of such products available, and that no person is deprived by the plaintiff of the opportunity to engage in the business of distributing petroleum products of the plaintiff and/or other oil companies and of servicing motor vehicles. Plaintiff is advised, and therefore charges, that it is not within the spirit and purpose of said House Bill No. 112.

Plaintiff is further advised, and therefore avers, that said House Bill No. 112 does not include gasoline filling or service stations and bulk distributing stations within the license tax provisions thereof. Section 8 of said Act defines

the word "store" to include any "store" or "mercantile establishment" in which goods, wares, or merchandise are sold, either at wholesale or retail. This language clearly indicates that it was not the legislative intent to impose said license taxes or fees upon service stations and bulk plants belonging to the plaintiff or upon said leased outlets and vending privilege outlets, but upon "stores" or "mercantile establishments" where the essential business carried on is the sale of ordinary and general articles of trade [fol. 29] and commerce, either at wholesale or retail. Plaintiff says that the principal business at said service stations, leased outlet and vending privilege outlets is the refueling and servicing of motor vehicles and that gasoline filling stations are not commonly considered "stores" or "mercantile establishments". Plaintiff further says that the common, ordinary and approved meaning of the terms "stores" or "mercantile establishments" and the use of said words in said Act affords no justification for the interpretation by defendant Tax Commissioner that said Act is applicable to the filling stations of the plaintiff and said leased outlets and vending privilege outlets. Plaintiff further says that its bulk distributing plants are mainly supply depots and warehouses. Sales at wholesale are in the main effected by traveling salesmen of the plaintiff and by tank truck drivers, and delivery of the products is made by truck from the most conveniently located bulk plant, and plaintiff says that its bulk distributing plants are not "stores" or "mercantile establishments" within the meaning of said Act.

Plaintiff further says that, if construction of said Act be deemed necessary, there is already existent legislative recognition in West Virginia of the fact that gasoline filling stations are not "stores" or "mercantile establishments" within the meaning of said House Bill No. 112. By a prior comprehensive revenue statute (sections 2 and 3, article 14, Chapter 11, Code of West Virginia) hereinbefore referred to, the Legislature of West Virginia has imposed a distinct and specific annual privilege tax upon every "filling station" or "place of business" from which gasoline is sold at retail and upon every "distributing station" from which gasoline is sold for resale or distribution or at which gasoline is produced, refined or compounded, measured by a flat rate upon each such station and based in addition upon the [fol. 30] quantities of gasoline sold at such "places of busi-

ness" at a specified flat rate. Plaintiff uniformly has complied with the licensing and taxing provisions of said comprehensive and specific statute, and has paid to the State of West Virginia, through the office of defendant Tax Commissioner, all license taxes accruing thereunder to the date of the filing of this bill of complaint, the same being license taxes upon the identical privilege of operating filling and distributing stations for which defendant Tax Commissioner, by his construction and aplication of said House Bill No. 112, has exacted the further sum of Two Hundred Forty Thousand One Hundred Seventy-Three Dollars and Fifty Cents. Said comprehensive and specific licensing statute upon gasoline filling and distributing stations has not been repealed. A true copy of said sections 2 and 3 of article 14, chapter 11, designated "Plaintiff's Exhibit I" is filed herewith as a part of this bill of complaint.

Plaintiff is advised and believes and charges that the action of defendant Tax Commissioner in attempting to enforce against the plaintiff the provisions of said Chain Store Tax Act (House Bill No. 112) while at the same time collecting the license taxes imposed by said Sections 2 and 3, article 14, Chapter 11 of the Code of West Virginia, is violative of the universal principle of statutory construction under which double taxation of the same property, privilege or right is never presumed to be the legislative intent.

XIII

Plaintiff is advised that in certain instances the courts of the United States and of the several states have upheld the validity of chain store tax legislation similar in some respects to House Bill No. 112, but that said courts have [fol. 31] based their decisions in whole or in part upon certain economic advantages which were said to inhere in the chain store system of merchandising. Plaintiff and/or its predecessor company was engaged in the refining, manufacturing, and distribution of petroleum products for many years prior to the acquisition of any service stations and prior to the effecting of contractual relations with the owners of said leased outlets; and the acquisition of such stations and outlets by the plaintiff and its said predecessor company has not been prompted or inspired by such advantages. Plaintiff denies that such alleged advantages inhere in its system of operations.

Quantity Buying and the Mass Process of Distribution

Plaintiff says that its present system of distribution involves no peculiar advantages of quantity buying or the application of the mass process of buying to the distribution of its products. The operation of its service stations and said outlets has not resulted in any increased opportunities in the way of quantity buying, nor have such methods of operation resulted in an increase in the distribution of plaintiff's products. The market of the plaintiff and its predecessor company for the distribution of petroleum products has always been state-wide in scope. The opening of its own service stations and the entrance into contractual relations with the owners or persons in control of numerous outlets have not brought to it a new or different market but were induced (1) by the necessity of providing for the frequent refueling and servicing of motor vehicles, (2) by the necessity of guaranteeing to the consuming public that products sold at said leased outlets are the products of the plaintiff, and (3) by the competition of other major oil companies. At all such places petroleum products of the plaintiff are being distributed to the same motoring public recurrently. The establishment of each [fol. 32] such service station and of each such leased outlet and vending privilege outlet has not resulted in acquiring a new market at the expense, or to the detriment, of independent local operators. A very large number of said outlets handled the products of the plaintiff prior to entering into such contractual relations with the plaintiff, and the making of such contracts has not substantially increased the number of places at which the products of the plaintiff are distributed nor the volume of said products sold in said state. By its present system of operations the plaintiff has endeavored merely to retain its market for the distribution of its products as against the competition of other oil companies doing business in a similar manner. The effect of such competition is not to displace the independent local operator or to place him upon unequal terms.

Buying for Cash at a Discount

Plaintiff and its predecessor company always engaged in large-scale purchasing, refining and distribution of petroleum products. The establishment of its own service stations and of said outlets has not improved its position

in this respect. The plaintiff or its predecessor company has not been enabled in any degree to purchase petroleum products for a lesser price than they could and did procure said products before the establishment of said company operated stations and leased outlets and vending privilege outlets. Under its present system of operations plaintiff has made no change in its buying practices resulting from the establishment of its own service stations and the acquisition of said outlets for the distribution of petroleum products in the state.

[fol. 33] Skill in Buying

The acquisition of service stations and the operation of said outlets have not enabled the plaintiff or its predecessor company to exercise greater skill in buying or to purchase a better quality or a larger quantity of products than they were able to do prior to the acquisition and/or operation of said service stations and said leased and vending privilege outlets.

Distribution from Single Warehouse to Numerous "Stores"

The plaintiff says that the establishment and maintenance of its many bulk distributing plants or supply depots in the state was not induced by new or additional economies to be achieved thereby. Since the commencement of business in said state the plaintiff and its said predecessor company have maintained warehouses and a warehousing system. The number and location of plaintiff's warehouses is and always has been determined by the growth of communities and by the development of means of transportation, the construction of highways, and the improvement of railroad and water shipping facilities. The inherent character of the products distributed by the plaintiff gives rise to peculiar problems of handling which make necessary extensive storage and warehousing facilities, independent of any possible marketing economies or advantages incident thereto.

Abundant Supply of Capital

For many years the plaintiff has had available the necessary capital to care for the development and operation of its business. The acquisition of its service stations has not

been made possible by the "abundant supply of capital" available to the plaintiff, but has been brought about by the needs and demands of motor vehicle consumers through- [fol. 34] out the state and by competition with other oil companies operating similarly to plaintiff. The operation of many of said outlets has not been made possible by the supply of capital at the disposal of the plaintiff, but has entailed an engagement by previously established dealers to distribute the petroleum products of the plaintiff as its agents rather than as independent operators.

Pricing and Sales Policy Involving Greater Turnover and Slightly Lower Prices

Plaintiff says that its present method of operations has not increased its volume of business nor the turnover of products, inasmuch as its products were distributed at many of the said leased outlets and vending privilege outlets prior to the making of said agreements for the distribution of its products upon such premises, as aforesaid. The operation of said service stations by plaintiff and of said leased outlets and vending privilege outlets has not made it possible for the plaintiff to sell its petroleum products at prices lower than the prices quoted by independent dealers. The plaintiff says that additional elements of cost in the distribution of its petroleum products at its service stations render it impossible for the plaintiff to distribute its products at as large a unit profit as ordinarily can be realized at service stations individually owned and operated. Independent dealers in petroleum products of the plaintiff and/or of other oil companies receive the same price therefor as does the plaintiff at its own service stations and realize a greater unit profit by reason of lower operating costs. The service stations owned and operated by the plaintiff are of a substantial and expensive design and character, and, as a rule, represent an investment in excess of the amount customarily invested in a service station of an individual owner. The rental paid by the [fol. 35] plaintiff to the lessors of said leased outlets and vending privilege outlets based upon the quantities of motor fuels sold, reduces materially the net operating revenue to the plaintiff from the petroleum products distributed at such places.

Unified, Cheaper and Better Advertising for an Entire Chain in a Given Locality

The advertising of the plaintiff has been directed to the consumers of petroleum products. The advertising is for the express benefit, not only of the plaintiff, but of all persons engaged in the business of distributing products manufactured and refined by the plaintiff, whether as independent dealers or as agents and employees of plaintiff at its own service stations. Five hundred and fifty-seven independent dealers in West Virginia handle products of the plaintiff under the same distinctive trade marks and brands used to designate the products distributed at plaintiff's service stations and at said leased outlets and vending privilege outlets. The independent dealers are benefited by the national advertising of the products of the plaintiff. The establishment of the service stations of the plaintiff and the operation of said leased outlets and vending privilege outlets have not occasioned, made possible, nor permitted any change in the manner, method or cost of the system of advertising used by the plaintiff.

Specialization

Plaintiff and its said predecessor company at all times have specialized and concentrated upon the production, distribution and sale of petroleum products. There has been no change in this policy since the acquisition of service stations and the operation of said leased outlets and vending privilege outlets.

[fol. 36] Advantages of Standardization

Plaintiff says that prior to the acquisition of said service stations and of the many outlets herein described, the advantages of standardization were more pronounced and more easily accomplished. Plaintiff further says that its predecessor, the Standard Oil Company, the New Jersey corporation, was more successful in achieving such advantages under its system of operations involving a large volume of business than the plaintiff now is with its present method of distributing petroleum products through said service stations and outlets; that the plaintiff has attempted to standardize its system of management and its business operations, but this policy has been rendered

more difficult by the building and acquisition of its numerous service stations and the operation of said outlets, and that the difficulties of standardization are especially pronounced at said 460 outlets where the vending privilege of the plaintiff is subordinate to the principal business conducted thereat and in which the plaintiff has no interest or concern.

XIV

Said House Bill No. 112 violates the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, in that, if construed to be applicable to the plaintiff, it deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the laws in the following particulars:

(a) Said Act is, in effect, a tax measure and has nothing to do with the exercise of the police power of the State. It has no relation to the public health, the public morals, or the public safety. It is not an inspection measure in which fees are prescribed for the purpose of covering the cost [fol. 37] of making the inspection. No provision is contained in said Act for regulation, supervision or inspection. No standards are prescribed for the conduct of the business subject to said tax. As a tax measure, its operation and effect are not equal or uniform, and the classification made by the terms of the Act is oppressive, prohibitory, unreasonable, arbitrary, discriminatory, and confiscatory as to the plaintiff.

(b) The classification, upon which the taxes imposed by said Act are based, rests wholly upon the number of "stores" owned, operated, maintained and/or controlled by the same person, firm, or corporation. The taxes so imposed are increased unequally, disproportionately, unreasonably and arbitrarily, and in such manner as to burden, oppress, prohibit, and discriminate against the ownership or ultimate management of two or more "stores", and unreasonbly, unequally, and disproportionately to discriminate against, oppress, burden, and penalize the employment of capital, skill, and efficiency by the plaintiff and others similarly situated, if such there be; and particularly to hinder and prevent the plaintiff from increasing the number of outlets for the sale of petroleum prod-

ucts. The tax rate for the first "store" under the Act is two dollars. Upon each "store" in excess of one, but not exceeding five, the tax is five dollars. Upon each "store" in excess of five but not exceeding ten, the tax is ten dollars. Upon each "store" in excess of ten, but not exceeding fifteen, the tax is twenty dollars. Upon each "store" in excess of fifteen but not exceeding twenty, the tax is thirty dollars. Upon each "store" in excess of twenty, but not exceeding thirty, the tax is thirty-five dollars. Upon each "store" in excess of thirty, but not exceeding fifty, the tax is one hundred dollars. Upon each "store" in excess of fifty, but not exceeding seventy-five, the tax is two hundred dollars. Upon each "store" in excess of seventy-[fol. 38] five the tax is two hundred and fifty dollars. If the defendant's interpretation of this Act be sustained, the plaintiff will be required to pay approximately three times as much tax on its thirty-first "store" as upon its thirtieth "store"; and twice as much tax on its fifty-first "store" as upon its fiftieth. The tax on the seventy-sixth "store" is more than seven times as high as on the thirtieth "store". The classification fixed by said Act rests upon no sound or reasonable basis, but is wholly arbitrary and unrelated to plaintiff's business.

The practical effect of such an unequal and disproportionate graduation is to discourage and depress the operation of the refineries of the plaintiff, including the refinery at Parkersburg, the operation of its trucks and motor equipment, the acquisition of real estate and leaseholds and the construction and operation of service stations thereon. A further practical effect of said tax will be the cancellation by the plaintiff of substantially all, if not all, of its outlet contracts, the result whereof will in no way benefit the public, but will be a distinct detriment to the operators of motor vehicles, who will thus be deprived of the benefits of a large number of service stations conveniently located and operated according to the standards required by the plaintiff, and at which the products of the plaintiff at all times are readily procurable.

(c) The service stations of the plaintiff and the outlets herein described are in direct, open and free competition in practically every locality where they are situated, not only with vending places operated by other oil companies and dealers handling the products of other oil companies, but

with independent dealers distributing the gasoline and/or other products of the plaintiff. In the case of many of the places of business where petroleum products are so dis-
[fol. 39] tributed, the owner or operator owns and controls but one establishment. In other instances, more than one such establishment is operated under a single management, but in all instances, the owner or operator has substantially the same advantages and opportunities as to commodity costs and sales economies as the plaintiff. The plaintiff avers that many of its competitors with substantially the same marketing advantages as the plaintiff, but who do not operate a large number of service stations, or who have not entered into outlet contracts, are subject to a nominal tax, while the plaintiff is subjected to an excessive, prohibitory, oppressive, and confiscatory tax in addition to the license taxes and other taxes to which it is subject, all of which is a denial to the plaintiff of the equal protection of the laws and a taking of its property without due process of law.

(d) The classification upon which said tax is based does not rest in any particular upon the ability of the taxpayers to pay said tax. It does not rest in any particular upon the income or earnings from any service station or vending place operated or controlled by the plaintiff. It has no relation to receipts. It is imposed regardless of whether the sales of plaintiff's products are at a profit or loss and irrespective of the amount of profit or loss therefrom. The tax has no relation whatsoever to the capital employed or invested. It does not take into account the type of business.

The Act in question, although directly imposing a tax, makes it unlawful for a person, engaged in lawful business, viz., the operation of "stores" and "mercantile establishments" to continue to engage in such business and to operate or maintain any "store" or "mercantile establishment", or to open or establish such business, without paying the so-
[fol. 40] called license taxes levied therein, although said Act is not based upon an exercise of the police power. Plaintiff further says that said Act imposes heavy penalties and fines upon the person or corporation failing to pay the taxes prescribed therein, and obedience is thus coerced to an invalid law by excessive and drastic penalties. It was because of such coercion that the plaintiff paid the said sum of $240,173.50 to the defendant under protest, as herein alleged.

(e) The Legislature of the State of West Virginia has no right under the guise of an excise or licensing measure to require persons, firms, or corporations engaged in a lawful ordinary business, trade or occupation to pay a tax as a condition precedent to the continuance of that business, trade or occupation where the so-called licensing feature has no relation to the public health, the public welfare, the public morals or the public safety.

(f) Said House Bill No. 112, and the rulings of the defendant Tax Commissioner interpreting same, in practical effect make it impossible for plaintiff to operate its stations and to do business under its outlet contracts at a profit, and confiscate under the guise of taxation any possible profit as well as the capital assets of the plaintiff. By reason of its ownership of a refinery, its bulk plants, service stations and other properties in said state, and its investment in improvements, leaseholds, fixtures, and other properties, the plaintiff cannot withdraw from business in said state without great sacrifice and at a tremendous loss of all of its said properties, and without losing the value of its good will, built up by the expenditure of vast sums of money throughout a period of many years. In consequence of the foregoing, said tax, as applied to the plaintiff, is prohibitory [fol. 41] and confiscatory, and in practical effect and operation is destructive of and takes the property of the plaintiff without due process of law.

(g) The license taxes or fees required to be paid under the terms and provisions of said Act are unequal and discriminatory. They are based upon a classification that is wholly arbitrary and unjust, and unreasonably discriminatory against the owners and operators of multiple "store" chains. The plaintiff is advised, and therefore charges, that the practical operation and effect of said Act will be to impose a small, and in some cases insignificant, license tax upon all but two national chain store systems operating in said state, which sell large quantities of goods, wares, or merchandise therein; that many of said national chain store systems operate a small number of "stores" in said state, but possess as to such "stores" all the advantages alleged to inhere in operations of national scope; that many of said national chain store systems with a comparatively small number of "stores" located in said state do a very sub-

stantial volume of business therein; that the ratio of the license taxes or fees imposed under said Act to the gross revenue of such national chain store systems from business in said state will be insignificant compared to the ratio between the license tax sought to be imposed upon the plaintiff under said Act and its gross revenue from business in said state; that the same comparison exists as to the plaintiff and the national chain store systems operating in said state in the respective ratios of all taxes and license fees imposed by said state and the political subdivisions thereof to the gross revenue accruing in said state; that with a few exceptions said national chain store systems sell and deliver far more goods, in quantity or value, from one "store" or unit than the plaintiff distributes and markets in the aggregate from a great number of its service stations and outlets, and that aside from such license taxes as may be de- [fol. 42] rived from the plaintiff and certain other large oil companies doing business in said state, the entire annual revenue to said state from said Act will not exceed One Hundred Thousand Dollars ($100,000.00) as a maximum, whereas the license tax sought to be imposed upon the plaintiff alone will amount to at least Two Hundred Forty Thousand One Hundred Seventy Three Dollars and Fifty Cents, as aforesaid. Plaintiff, therefore, says that, in practical effect, said Act is an unfair, oppressive, unequal, and unwarranted burden upon the plaintiff and other oil companies similarly situated, if such there be.

Plaintiff does not have available an accurate list of the "stores" and "mercantile establishments" in the state of West Virginia which are within the terms of said Act, but it has obtained from the office of the defendant a list of persons, firms, and corporations (other than oil and gasoline companies) which owned or operated more than one store or mercantile establishment in said state in the year 1931. Plaintiff says that said list is not entirely accurate and complete, but that there have been few, if any, increases in the holdings of any of such persons within the last two years, and that for the purpose of illustrating the manner in which said Act affects the plaintiff and those who own and/or operate more than one "store" or "mercantile establishment", said list may be accepted as substantially up to date and accurate. Plaintiff, therefore, files said list, marked "Owners and/or Operators of Stores

in West Virginia," as "Plaintiff's Exhibit J", and asks that the same be read and considered as an integral part of this bill of complaint.

[fol. 43] XV

Said Act, if construed to be applicable to the plaintiff, violates Section Ten of Article Three of the Constitution of the State of West Virginia, which is as follows:

"No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."

Section One of Article Ten of the Constitution of the State of West Virginia, ratified and adopted by the voters of said State, at the General Election held in said State on November 8, 1932, reads as follows:

"Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two [fol. 44] dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, and such increase shall not con-

tinue for a longer period than three years at any one time, and shall never exceed by more than fifty per cent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the legislature among the levying units of the state in proportion to the levy laid in said units upon real and other personal property; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the legislature may provide. After the year nineteen hundred thirty-three, the rate of the state tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the state now existing."

Said Act violates the said constitutional provisions in the following particulars:

[fol. 45] (a) Said Act, in its nature and effect, is a tax measure and provides rates of taxation which are not equal and uniform, and requires persons of the same class, to-wit, owners and/or operators of "stores" and "mercantile establishments", similarly situated, to pay unequal rates of taxation. The plaintiff, because of the fact that it owns and operates one hundred and one (101) service stations and fifty-four (54) bulk plants, and has entered into outlet contracts covering eight hundred forty-eight (848) locations in the State of West Virginia, will be required to pay a rate of taxation one hundred twenty-five times as high as the operator of a similar station who owns and controls but one such station in said state.

(b) Owners and operators of "stores" and "mercantile establishments" are not taxed at a uniform rate, graduated in proportion to the volume of business done, or to the value of the property owned or operated by them, but the taxes are increased upward so that the proportionate increase has no relationship to the increase of sales or earnings or to property values.

(c) Said Act on its face is a classified and graduated tax on the privilege of owning, operating, maintaining and/or controlling "stores" and "mercantile establishments" in violation of said Constitutional Amendment which limits classification and graduation to taxes on incomes.

(d) While said Act on its face purports to be a license tax on the privilege of operating "stores" and "mercantile establishments", in practical effect it singles out the business of distributing petroleum products as carried on by the plaintiff and others similarly situated, if such there be, imposes thereon a prohibitory and confiscatory tax, and, [fol. 46] with few exceptions, imposes a relatively insignificant tax on the owners and/or operators of "stores" in said state.

(e) Said Act imposes an excessive license tax upon the plaintiff in addition to the license tax assessed under said sections 2 and 3, Article 14, Chapter 11, of the Code of West Virginia and constitutes a double tax upon the privilege of operating service stations, bulk distributing stations, leased outlets, and vending privilege outlets.

(f) Under the provisions of sections 2 and 3, Article 13, Chapter 11, Code of West Virginia, imposing a business and occupation tax on account of certain business activities therein referred to, and providing a single exemption for each person subject thereto regardless of the number of "stores" or "places of business" operated by such person, the plaintiff at all times has paid in effect a license tax for the privilege of owning, operating, maintaining and/or controlling more than one service station or outlet, and, therefore, the application of said House Bill No. 112 to the plaintiff constitutes double taxation of the same privilege or right.

XVI

Defendant Tax Commissioner's ruling and interpretation, wherein he is attempting to apply the terms and provisions

of said Act to the service stations operated by the plaintiff and the outlets at which the petroleum products of the plaintiff are distributed, is violative of and not warranted by said Act, for the following reasons:

(a) The service stations owned and operated by plaintiff, said bulk distributing plants, the said leased outlets and [fol. 47] vending privilege outlets are not "stores" or "mercantile establishments" within the meaning of said Act.

(b) Said leased outlets and vending privilege outlets are not "stores" or "mercantile establishments" owned, operated, maintained and/or controlled by the plaintiff.

(c) The bulk plants owned by plaintiff are mainly warehouses and not "stores" or "mercantile establishments" in which goods, wares or merchandise are sold within the meaning of said Act.

(d) The plaintiff pays a specific license tax under sections 2 and 3, Article 14, Chapter 11, Code of West Virginia, for the privilege of operating its various "places of business".

XVII

Plaintiff alleges that unless the defendant Tax Commissioner is enjoined and restrained from paying over to the State Treasury the money so paid to him by the plaintiff under protest and duress, the plaintiff will sustain irreparable loss, damage, and injury in each of the following particulars and for the following reasons:

(a) The defendant, while not personally insolvent, is not possessed of money or property, personal or real, to the value of $240,000, and so far as can be reasonably anticipated, said defendant will not be possessed, either in his personal or official capacity, of available money or property in an amount sufficient to enable him to respond in damages to the money judgment or decree which will be entered in favor of the plaintiff in the event that it should [fol. 48] prevail in this or any other proceeding for the recovery of the money so paid. The official bond of the defendant Tax Commissioner in the penalty of Five Thousand Dollars ($5,000.00) is wholly insufficient to secure the payment of any such judgment or decree. The only means by

which said defendant, either in his personal or official capacity, may be enabled to respond to such a judgment or decree is the retention by him of the tax money paid to him by the plaintiff as hereinbefore set forth.

(b) Said Act requires defendant Tax Commissioner to pay into the State Treasury monthly all moneys received by him under the provisions of said Act, and said defendant has declared his intention to pay said tax money so paid to him by the plaintiff into the State Treasury on first day of July, 1933.

(c) If and when defendant should pay said tax moneys into the State Treasury there is no proceeding provided by law for the recovery thereof by the plaintiff.

(d) A judgment or decree in favor of the plaintiff in this or any other proceeding after payment of said moneys into the State Treasury would be unenforceable and uncollectible.

(e) The provisions of the Act require that after payment into the State Treasury said tax moneys shall constitute a part of the general fund for the elementary schools. Plaintiff is advised that for many months there has been, that there is now, and that for an indefinite period in the future there will continue to be, a substantial deficit in said general fund.

(f) After the entry of judgment or decree for the recovery of said money by the plaintiff, and after a suitable [fol. 49] appropriation by the legislature, if one should be made, which appropriation would rest entirely and solely within the discretion of the members thereof, there is no jurisdiction in the Courts of the United States or of the State of West Virginia to compel the satisfaction of such judgment and/or the compliance with such appropriation by the state or any of its officers, agents, or employees.

(g) There is no provision in said Act for the payment of interest upon such moneys paid by a taxpayer under protest. In the event the defendant Tax Commissioner should pay into the State Treasury the money received by him from the plaintiff under said House Bill No. 112, and the Legislature of said State subsequently should appropriate said sum of money in satisfaction of a judgment or decree in favor of the plaintiff, there is no assurance that the plain-

tiff would receive interest for the period said sum is withheld from the plaintiff.

(h) Said Act is ambiguous and doubtful with respect to the remedy of a taxpayer to recover taxes paid under protest. Said Act has not been interpreted by any court of the State of West Virginia or of the United States.

XVIII

Inasmuch, therefore, as the plaintiff is without adequate and complete remedy at law, and can obtain relief only in a court of equity, the plaintiff prays:

1. That writs of subpœna be issued to the defendant, requiring him to answer this complaint fully and truthfully.

[fol. 50] 2. That a temporary restraining order and interlocutory injunction be issued, restraining the defendant from paying into the Treasury of the State of West Virginia the said sum of $240,173.50, paid to him under protest, and demanded by the defendant to be paid by the plaintiff under the color of the terms of said House Bill No. 112, and plaintiff prays that upon final hearing the said defendant be perpetually enjoined and restrained from paying said money into the State Treasury of West Virginia and from in any manner enforcing against this plaintiff the provisions of said House Bill No. 112.

3. That said sum of $240,173.50, so unlawfully collected, withheld and retained by said defendant under the color of said Act, be declared a trust fund in the hands of the defendant for the use and benefit of the plaintiff, and that upon final hearing a decree be entered requiring the defendant to account for and return said sum to the plaintiff.

4. That upon final hearing this Court adjudge, order and decree that the plaintiff be not required to pay any tax or to procure any license under the terms and provisions of said House Bill No. 112, and that the enforcement and execution thereof as against this plaintiff be perpetually enjoined.

5. That the plaintiff may have all such other, further and general relief as may be just and equitable in the premises.

H. D. Rummel, Rummel, Blagg & Stone, Solicitors for Plaintiff.

[fol. 51] *Duly sworn to by C. G. Sheffield. Jurat omitted in printing.*

[fol. 52] PLAINTIFF'S EXHIBIT A TO BILL OF COMPLAINT

An Act of the Legislature of West Virginia

(H. B. No. 112)

[Passed March 8, 1933; in Effect from Passage. Became a Law Without the Approval of the Governor]

An act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof.

Be it enacted by the Legislature of West Virginia:

Section 1. It shall be unlawful for any person, firm, corporation, association or copartnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained a license so to do from the state tax commissioner, as hereinafter provided.

Sec. 2. Any person, firm, corporation, association or copartnership desiring to operate, maintain, open or establish a store in this state, shall apply to the state tax commissioner for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state tax commissioner, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license, the name [fol. 53] of such store, and such other facts as the state tax commissioner may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section five of this act.

Sec. 3. As soon as practicable after the receipt of any such application, the state tax commissioner shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite

information. If, upon examination, the state tax commissioner shall find that any such application is not in proper form and does not contain the necessary and requisite information, he shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid, the state tax commissioner shall issue to the applicant a license for each store for which an application for license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which such license is issued.

Sec. 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar year. On or before the first day of January of each year, every person, firm, corporation, association or copartnership having a license shall apply to the state tax commissioner for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the state tax commissioner. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued; if a renewal license has [fol. 54] not been made, the state tax commissioner shall notify such delinquent license holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing, the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section five of this act.

Sec. 5. Every person, firm, corporation, association or co-partnership opening, establishing, operating, maintaining one or more stores or mercantile establishments, within this state under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The annual license fee prescribed herein shall be as follows: (1) Upon one store, the annual license fee shall be two dollars for each such store; (2) upon two stores, or more, but not to exceed five stores, the annual license fee shall be five dollars for each such additional store; (3) upon six stores or more, but not to exceed ten stores, the

annual license fee shall be ten dollars for each such additional store; (4) upon each store in excess of ten, but not to exceed fifteen, the annual license fee shall be twenty dollars for each such additional store; (5) upon each store in excess of fifteen and not to exceed twenty stores, the annual license fee shall be thirty dollars for each such additional store; (6) upon each store in excess of twenty, but not to exceed thirty stores, the annual license fee shall be thirty-five dollars for each such additional store; (7) upon each store in excess of thirty, but not to exceed fifty stores, the annual license fee shall be one hundred dollars; (8) upon each store in excess of fifty, but not to exceed seventy-five stores, the annual license fee shall be two hundred dollars; (9) upon each store in excess of seventy-five, the annual [fol. 55] license fee shall be two hundred fifty dollars for each additional store.

Sec. 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one-half of the full rate, as prescribed in section five of this act.

Sec. 7. The provisions of this act shall be construed to apply to every person, firm, corporation, copartnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Sec. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.

Sec. 9. Any person, firm, corporation, copartnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

Sec. 10. Any and all expenses incurred by the state tax commissioner in the administration of this act shall be

paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this act shall be paid [fol. 56] into the state treasury, monthly, by the state tax commissioner, and shall be added to and shall constitute a part of the general fund for the elementary schools.

Sec. 11. No injunction shall issue from any court in this state enjoining the collection of any license tax provided herein, but the party claiming that any license is not due, for any reason, shall pay the same under protest with right to collect the same from the state tax commissioner by an appropriate remedy as provided by law.

Sec. 12. The provisions of this act are several, and if any section, provision, word or clause of this act be declared invalid, the decision of the court shall not affect or impair any of the remaining provisions of this act. It is hereby declared as a legislative intent that this act would have been adopted had such invalid portion not been included herein.

(Here follows Exhibit B, side folio 57)

102—9-30-33

THIS APPLICATION IS TO BE FORWARDED WITH AMOUNT OF LICENSE TAX TO FRED L. FOX, STATE TAX COMMISSIONER, BOX 1818, CHARLESTON, W. VA.

APPLICATION FOR LICENSE

FOR THE OPERATION, MAINTENANCE, OPENING OR ESTABLISHMENT OF ANY STORE OR STORES IN WEST VIRGINIA FOR THE YEAR ENDING DECEMBER 31, 1933

HOUSE BILL NO. 112, 1933 LEGISLATURE

FOR USE OF BUREAU ONLY

Date Received_____

Serial No._____

Amount Received $_____

Amount of Tax $_____

License No._____ Index_____

Name of Owner_____
OR CONTROL OF OPERATION

Address_____

Number of Stores Operated or to be Operated_____

1. Location of Store_____
TOWN OR POSTOFFICE — COUNTY — STREET LOCATION

Kind of Business_____ Name of Store_____

2. Location of Store_____
TOWN OR POSTOFFICE — COUNTY — STREET LOCATION

Kind of Business_____ Name of Store_____

3. Location of Store_____
TOWN OR POSTOFFICE — COUNTY — STREET LOCATION

Kind of Business_____ Name of Store_____

4. Location of Store_____
TOWN OR POSTOFFICE — COUNTY — STREET LOCATION

Kind of Business_____ Name of Store_____

5. Location of Store_____
TOWN OR POSTOFFICE — COUNTY — STREET LOCATION

Kind of Business_____ Name of Store_____

NOTE: Attach separate sheet if license is desired for more than 5 stores.

Amount of remittance accompanying application $_____

I hereby make application for license for the stores herein named and hereby certify that this application includes all stores which are controlled or directed by one Management or Association, which Management or Association is named herein at the beginning of this application, and that the statements contained herein are true and correct to the best of my knowledge and belief.

SCHEDULE OF LICENSE TAX

License for 1 Store, $ 2.00; Application Fee, $ .50; Total, $ 2.50
License for 2 Stores, $ 7.00; Application Fee, $1.00; Total, $ 8.00
License for 3 Stores, $12.00; Application Fee, $1.50; Total $13.50
License for 4 Stores, $17.00; Application Fee, $2.00; Total, $19.00
License for 5 Stores, $22.00; Application Fee, $2.50; Total, $24.50

_____
NAME OF APPLICANT

By_____

_____
OFFICIAL TITLE OR CAPACITY

Upon 6 stores or more, but not to exceed 10 stores, $10.00 for each additional store; upon each store in excess of 10, but not to exceed 15, $20.00 for each additional store; upon each store in excess of 15 and not to exceed 20 stores, $30.00 for each additional store; upon each store in excess of 20, but not to exceed 30 stores, $35.00 for each additional store; upon each store in excess of 30, but not to exceed 50 stores, $100.00; upon each store in excess of 50, but not to exceed 75 stores, $200.00; upon each store in excess of 75, $250.00 for each additional store. Application fee of 50 cents shall be added for each store to the amount of tax.

[fol. 58] St-20m-4-27-33.

State of West Virginia

Charleston

Fred L. Fox, State Tax Commissioner

May 3, 1933.

License for Operation, Maintenance, Opening or Establishment of Store or Stores Required by House Bill 112, 1933 Session Legislature

License Required to Operate Store

Section 1, House Bill 112, passed and in effect March 8, makes it unlawful for any person to operate, maintain, open or establish any store or stores in this state without having obtained a license so to do from this office.

Application Form Enclosed

Application form prescribed under authority of Section 2 is enclosed for use in applying for license or licenses for the calendar year 1933. The act provides that each license issued before July 1st is to be charged at the full rate, (see schedule of fees on Application Form) and after July 1st at one-half of the full rate.

Stores Operated or Maintained under one Management or Control

In case two or more stores are operated, maintained, opened or established by a person, firm, corporation, copartnership or association, either domestic or foreign, [fol. 59] under the same general management, supervision or ownership, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, application for licenses shall be made on one application form by listing thereon the respective stores for which licenses are desired. Application fee of 50 cents shall be added for each store to the amount of tax.

Definition of "Store"

Section 8 provides that the term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.

Licenses to be Conspicuously Displayed

Each licensee is required to display the license issued under the provisions of this act in a conspicuous place in the store for which such license is issued.

Renewal Licenses

Application blanks for renewal license or licenses for the calendar year 1934 will be mailed to each licensee on December 30th next.

Yours very truly, Fred L. Fox, State Tax Commissioner.

[fol. 60] PLAINTIFF'S EXHIBIT C TO BILL OF COMPLAINT

State of West Virginia

Charleston

Fred L. Fox, State Tax Commissioner

June 5, 1933.

License Required by House Bill 112, 1933 Session Legislature for Year Ending December 31, 1933

Unlawful to Operate any Mercantile Establishment Without License

It is unlawful for you to continue to operate your mercantile establishment or establishments in West Virginia in which goods are sold either at retail or wholesale without applying to this office for license. Application form was sent to you with letter dated May 3, but the records of this office fail to show receipt of your application with remittance.

Form is enclosed for your use in filing application for license or licenses for the year ending December 31, 1933. You are hereby notified that this application must be received not later than seven days from date; otherwise you will render yourself subject to the penalties imposed by section 9 of the act for violation of the provisions of the law with respect to operating or maintaining a "store" or "stores" as defined under the law, without the license required by Section 1.

Application must be accompanied by remittance of $2.50 for one "store", and if more than one "store" is operated [fol. 61] the schedule of rates at the foot of the application form is to be followed.

Yours very truly, Fred L. Fox, State Tax Commissioner.

Sec. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.

Sec. 9. Any person, firm, corporation, copartnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

[fol. 62] PLAINTIFF'S EXHIBIT D TO BILL OF COMPLAINT

This is to certify that on the 6th day of June, 1933, the originals of the copies of the papers and documents hereto attached were filed in this office by the Standard Oil Company of New Jersey, said papers being as follows:

(1) Letter of protest, dated June 6, 1933 (2 sheets).

(2) Application for license, executed by Standard Oil Company of New Jersey, by J. C. King, Manager.

(3) Schedules as follows:

(a) Bulk plants, West Virginia Branch (1 sheet).

(b) Bulk plants, Baltimore Branch (1 sheet).

(c) Company operated Service Stations, West Virginia Branch (2 sheets).

(d) Company operated Service Stations, Baltimore Branch (1 sheet).

(e) Exclusive contract outlets, West Virginia Branch (28 sheets).

(f) Exclusive contract outlets, Baltimore Branch (5 sheets).

(g) Exclusive contract outlets, Virginia Branch (1 sheet).

(h) Recapitulation (1 sheet).

Fred L. Fox, Tax Commissioner of the State of West Virginia, by Fred L. Fox.

[fol. 63] June 6, 1933.

Fred L. Fox, Esq., State Tax Commissioner of W. Va., Charleston, W. Va.

DEAR SIR: We enclose the checks of the Standard Oil Company of New Jersey in the amount of $240,173.50 to cover filing and license fees claimed by you to be due to the State of West Virginia under the provisions of an Act of the Legislature effective March 8, 1933, and designated as House Bill No. 112.

The li[illegible] fee is calculated upon the basis of your instruction[illegible]at all filling stations owned or leased by the company and operated by its employees, and all filling stations and all places owned and operated by others, but at which vending equipment of the Standard Oil Company has been installed and Standard petroleum products are sold exclusively, are considered by you to be taxable under the act as stores of the Standard Oil Company. The Company owns, or leases, and operates on a salary or commission basis 101 filling stations and 54 bulk plants at which petroleum products are sold at retail and/or wholesale. The Company has contractual relations with the owners or those in control of the premises where its vending equipment for the sale of motor fuels, oils and greases are installed at 848 locations in this state. At 460 of these 848 locations, the vending of gasoline and oils is incidental to the general mercantile business conducted on the premises by others.

We have been advised that the Act referred to is unconstitutional and violates the provisions of the Constitution of the United States and amendments thereto and the Consti-

[fol. 64] tution of the State of West Virginia and amendments thereto. We have also been advised that none of the filling stations and places covered by this return are stores or mercantile establishments within the meaning of the Act, and that none of the vending places owned by others and operated through exclusive contracts with this Company are owned, operated, maintained and/or controlled by this Company as contemplated by the Act. For these and other reasons we have been advised that House Bill No. 112 imposes no liability upon this Company and no language or expression in the printed form of application for license prepared by you and signed by us shall be deemed an admission of liability.

Section 9 of the Act provides:

"Sec. 9.—Any person, firm, corporation, copartnership or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense."

This payment is made for the sole purpose of avoiding the imposition upon this Company of any penalties in the event the validity and application of said law should be sustained. However, it must be understood that this payment is made under protest pursuant to Section 11 of the Act which provides, in part, as follows:

"The party claiming that any license is not due for any reason, shall pay the same under protest with the right to collect the same from the State Tax Commissioner by an appropriate remedy, as provided by law."

[fol. 65] It is our position that no tax or license is due from this Company under the Act, and that it is not obligated to pay the amount mentioned above or any part thereof. We, therefore, are paying this tax under protest and duress, reserving the right to collect the same in such manner as we may be advised.

Yours truly, J. C. King, Manager.

CC: Rummell, Blagg & Stone, Attorneys at Law, Charleston, W. Va.

CC: Mr. E. S. Hall, Law Department, Standard Oil Co. of N. J., 26 Broadway, New York, N. Y.

(Here follows Exhibit D, side folio 66-96)

THIS APPLICATION IS TO BE FORWARDED WITH AMOUNT OF LICENSE TAX TO FRED L. FOX, STATE TAX COMMISSIONER, BOX 1516, CHARLESTON, W. VA.

APPLICATION FOR LICENSE

FOR THE OPERATION, MAINTENANCE, OPENING OR ESTABLISHMENT OF ANY STORE OR STORES IN WEST VIRGINIA FOR THE YEAR ENDING DECEMBER 31, 1933

HOUSE BILL NO. 112, 1933 LEGISLATURE

Standard Oil Company of New Jersey,

Charleston, W. Va.

FOR USE OF BUREAU ONLY

Date Received_____

Serial No._____

Amount Received $_____

Amount of Tax $_____

License No._____ Index_____

Name of Owner Standard Oil Company of New Jersey

Address Charleston, W. Va. (OR CONTROL OF OPERATION)

Number of Stores Operated or to be Operated 1003

1. Location of Store List attached (Bulk Plants and Company Operated Service Stations) 155
(TOWN OR POSTOFFICE) (COUNTY) (STREET LOCATION)

Kind of Business List attached (Exclusive Contract Outlets) Name of Store 848

2. Location of Store 1003
(TOWN OR POSTOFFICE) (COUNTY) (STREET LOCATION)

Kind of Business_____ Name of Store_____

3. Location of Store_____
(TOWN OR POSTOFFICE) (COUNTY) (STREET LOCATION)

Kind of Business_____ Name of Store_____

4. Location of Store_____
(TOWN OR POSTOFFICE) (COUNTY) (STREET LOCATION)

Kind of Business_____ Name of Store_____

5. Location of Store_____
(TOWN OR POSTOFFICE) (COUNTY) (STREET LOCATION)

Kind of Business_____ Name of Store_____

NOTE: Attach separate sheet if license is desired for more than 5 stores.

Amount of remittance accompanying application $ $240,173.50

I hereby make application for license for the stores herein named and hereby certify that this application includes all stores which are controlled or directed by one Management or Association, which Management or Association is named herein at the beginning of this application, and that the statements contained herein are true and correct to the best of my knowledge and belief.

SCHEDULE OF LICENSE TAX

License for 1 Store, $ 2.00; Application Fee, $ .50; Total, $ 2.50
License for 2 Stores, $ 7.00; Application Fee, $1.00; Total, $ 8.00
License for 3 Stores, $12.00; Application Fee, $1.50; Total $13.50
License for 4 Stores, $17.00; Application Fee, $2.00; Total, $19.00
License for 5 Stores, $22.00; Application Fee, $2.50; Total, $24.50

Standard Oil Company of New Jersey
(NAME OF APPLICANT)

By J. C. KING,

Manager
(OFFICIAL TITLE OR CAPACITY)

Upon 6 stores or more, but not to exceed 10 stores, $10.00 for each additional store; upon each store in excess of 10, but not to exceed 15, $20.00 for each additional store; upon each store in excess of 15 and not to exceed 20 stores, $30.00 for each additional store; upon each store in excess of 20, but not to exceed 30 stores, $35.00 for each additional store; upon each store in excess of 30, but not to exceed 50 stores, $100.00; upon each store in excess of 50, but not to exceed 75 stores, $200.00; upon each store in excess of 75, $300.00 for each additional store. Application fee of 50 cents shall be added for each store to the amount of tax.

66-96

[fol. 97] Recapitulation

	Bulk station	Service stations	Exclusive contract outlets	Total
West Va. Branch...	43	98	732	873
Baltimore Branch...	11	3	112	126
Virginia Branch.....			4	4
Total.....	54	101	848	1003

5	Stations				$22.00
5	"	@	$10.00	each	50.00
5	"	@	20.00	"	100.00
5	"	@	30.00	"	150.00
10	"	@	35.00	"	350.00
20	"	@	100.00	"	2,000.00
25	"	@	200.00	"	5,000.00
928	"	@	250.00	"	232,000.00
1003	"	@	.50	"	501.50
	Total				240,173.50

NOTE: We have in the State of West Virginia vending privileges only at 460 of our exclusive contract outlets.

[fol. 98] PLAINTIFF'S EXHIBIT E TO BILL OF COMPLAINT

DS-52-A—BP-1102.
Revised 6-10-31.

Standard Oil Company of New Jersey

Lease (Rental Determined by Sales)

Agreement made this — day of ——, in the year 19—, by and between ——, hereinafter called Lessor, and Standard Oil Company of New Jersey, a corporation of the State of Delaware, hereinafter called Lessee.

Witness: Lessor does hereby demise and lease unto Lessee all that lot, piece or parcel of land situated in the Town of ——, County of ——, State of ——, described as follows: That is to say,

together with the buildings, improvements and equipment thereon or connected therewith, all of which are listed in the Schedule "A" hereto attached.

To hold the premises hereby demised unto Lessee for the period of one year beginning on the — day of ——, 19—, and ending on the — day of ——, 19—, Lessee paying therefor as rental each month an amount equivalent to one cent (1c.) for each gallon of gasoline and other motor fuels sold during the month at said premises by the Lessee or its agents or assigns. Payments of said rental are to be made on or before the tenth day of the month following the month in which the rental is earned. Lessee shall keep such books and records as will accurately show the number of gallons of gasoline and other motor fuels sold at the demised premises and will permit the Lessor to examine and inspect such books and records at any time and from time to time when the Lessor desires so to do.

The above letting is on the following terms, conditions and covenants, to wit:

1. Lessee shall pay the specified rent at the times and in the manner provided.

2. Lessor agrees to pay all taxes and assessments now or hereafter levied against said premises. Should Lessor fail to pay such taxes or assessments when due and payable, Lessee shall have the right to pay the same and may withhold from any rentals payable hereunder as they accrue, such amounts as may be necessary to fully reimburse Lessee.

[fol. 99] 3. Lessee may move, remove, change or alter any building, structure, tanks, curbing, pavement or driveways now on said premises and may construct, build, and place upon said premises such buildings, structures, equipment and machinery as shall in its opinion be necessary to use and operate said premises. Lessee may paint said buildings, structures, tanks and equipment in any colors it shall select and to paint thereon such of its trade-marks and other signs, devices and advertisements as it shall elect.

4. Upon the expiration or termination of this Lease for any cause Lessee is to return the property herein described to Lessor and Lessee shall restore said premises to the condition existing on the date hereof, ordinary wear and tear excepted, provided, however, Lessee shall not be required to replace or relocate any building, structures, tanks or machinery removed or relocated with the express consent

of Lessor. Lessee shall have the right to remove from said premises all buildings, structures, pumps, tanks, machinery and equipment placed thereon by lessee.

5. In case the premises are rendered unfit for occupancy by fire, store, explosion, or any other cause, no rental shall accrue or is to be paid from the beginning of such unfitness for occupancy until the property is put in tenantable condition, and Lessee is able to and does occupy said premises for the purposes herein described.

6. Lessee during the term of this lease or any renewal or extension thereof shall have the right and privilege to sublet or assign all or any part of its right under and to said premises, but any such subletting or assignment shall not relieve Lessee from its obligation to pay the rent herein reserved unless Lessor shall consent in writing to such subletting or assignment.

7. Lessee shall have the privilege and option of renewing this Agreement from period to period for — additional periods of one (1) year each, the first of such periods to begin on the expiration of the first period herein granted, and each successive period to begin on the expiration of the period then in effect, upon the same terms and conditions as herein set forth and all of said privileges of renewal and extension shall be considered as having been exercised unless Lessee gives notice in writing at least thirty (30) days prior to the expiration of the period then in effect of its intention not to exercise each renewal privilege.

8. Lessee has and is hereby given the right to cancel this Lease at any time on giving Lessor thirty (30) days' notice of Lessee's intention so to do. On the date such cancellation becomes effective, Lessee shall pay to Lessor as consideration for said cancellation an amount which shall be determined by multiplying the largest rental theretofore paid in any one month under this lease by the number of full years remaining before the expiration of this lease.

9. It is further understood and agreed between Lessor and Lessee that Lessee shall have the right and option to purchase the property hereinbefore described, including the property described in Schedule "A" hereto attached for the sum of — Dollars at any time during the term hereof. Lessor may terminate the right and option of the

Lessee to purchase said property at any time on giving six [fol. 100] months' notice of his intention so to do and the right and option of Lessee to purchase shall terminate on the expiration of six months after the receipt of such notice. In the event Lessee desires to exercise said right and option to purchase, it shall give notice in writing of its intention so to do at least ten (10) days prior to the date when said sale is to be completed and at the time specified in said notice and upon the payment of said purchase price Lessor will execute and deliver to Lessee or its successors or assigns a good and sufficient deed with full covenants and war-anty and a good and sufficient bill of sale sufficient to convey to Lessee good and marketable title in fee simple the property described herein and in Schedule "A" attached free and clear of all liens and encumbrances of whatsoever kind and character.

10. Any notice to be given by Lessee to Lessor shall be sufficiently given, if in writing, and delivered to Lessor, or mailed, postage prepaid, to Lessor at the premises herein described, or at such other address as may at any time be furnished by Lessor to Lessee.

In witness whereof, the parties hereto have executed this agreement the day and year first above written.

—— ——, Lessor. Standard Oil Company of New Jersey, by —— ——, Branch Manager.

Attest:

—— ——.

(Incorporate here the acknowledgment of the Lessor in the statutory form of the State where the leased property is situated.)

Consent of Land Owner

The undersigned hereby consents to the subletting of the Lessor's rights in accordance with the above agreement. The undersigned further agrees that in the event the Lessor named in the above mentioned agreement defaults in any of the terms or conditions of the lease or other agreement under which said Lessor holds the above described premises, the undersigned will advise the Standard Oil Company of New Jersey at —— of said default, and said Standard Oil Company of New Jersey shall have the option, to be exercised at any time within ten (10) days

after the receipt of said notice, but shall not be obligated, to make good said default on the part of the above mentioned Lessor, and the undersigned agrees that so long as the Standard Oil Company of New Jersey thereafter com-
[fol. 101] plies with the terms of said agreement under which the above mentioned Lessor acquired said premises, its rights in and to the property under this agreement, shall be valid and remain in full force and effect.

Dated this — day of ——, 19—.

—— ——.

Schedule "A".

[fol. 102] PLAINTIFF'S EXHIBIT F TO BILL OF COMPLAINT

DS-52-B—BP-1103.
Revised 8-1-32.

Commission Agency Agreement

This agreement, made this — day of ——, 19—. by and between Standard Oil Company of New Jersey, hereinafter designated "Principal," and —— of the City of ——, State of ——, hereinafter designated "Agent":

Witnesseth:

1. Principal does hereby employ Agent to superintend, manage and operate its service station for the sale of gasoline and other motor fuels, motor oils, greases and other petroleum products sold by Principal upon the premises situated in the Town of ——, County of ——, State of ——, described as follows, that is to say:

2. Agent agrees during the term of his employment to sell, handle, deal in, advertise and dispense only the petroleum products delivered to him by Principal and that he will not sell, handle, deal in, advertise or dispense petroleum products of any other manufacturer, jobber or agent unless such products are delivered to him by Principal.

3. Agent agrees to operate said service station in compliance with the rules, regulations, directions and manuals of Principal and in a manner satisfactory to Principal, of which Principal shall be the sole judge, and will keep the

said service station open for business during such hours as Principal shall specify.

4. Agent is hereby given the right to handle and to deal in automobile supplies and accessories other than petroleum products in his own name and on his own behalf and for his personal account, but not in the name of, on behalf of, or for the account of Principal, provided, however, that the exercise of said right shall not interfere with the proper operation of said service station, its appearance or with any advertising incident to the sale of any petroleum products furnished by Principal.

5. Agent agrees to sell from said service station all petroleum products at the prices and upon the terms to be from time to time fixed and determined by Principal and that he will not extend any credit unless previously authorized so to do by Principal. Should Agent make any [fol. 103] credit sales without being previously authorized so to do by Principal, said sales shall be for his account alone. When Agent makes any sale on credit previously authorized by Principal, he shall take from the customer a signed receipt for such sale and shall forward all such signed receipts to Principal. As soon after the end of each month as practicable, Principal will remit to Agent or credit Agent's account with the amount Principal is entitled to receive with respect to the sales shown by such receipts to have been made by Agent on credit authorized by Principal.

6. Principal will pay to Agent or allow Agent to deduct as herein provided on sales, other than those to commercial consumers, at said station at the price established by Principal at said station a commission of two and one-half cents (2½c) per gallon on Esso and a commission of two and one-half cents (2½c) per gallon on "Standard" gasoline. If the difference between the Principal's regularly posted retail tank wagon price reduced by the posted discount allowed to dealers, exclusive of tax, at its bulk plant from which said station is supplied for Esso or "Sandard" gasoline and the price, exclusive of tax, at which Principal directs Agent to sell Esso or "Standard" gasoline is less than three cents (3c), then the commisson payable as provided in this paragraph shall be reduced by one-half of the amount such difference between said retail tank wagon

price reduced by the posted discount allowed to dealers and price at which Principal directs Agent to sell is less than three cents (3c).

Principal during the term of the employment of Agent agrees to pay Agent or allow Agent to deduct as herein provided on all sales on credit to commercial consumers at prices below those established at said station by Principal for sales on credit to other kinds of consumers, a commission of one cent (1c) per gallon on all Esso, and a commission of one cent (1c) per gallon on all "Standard" gasoline.

Within thirty (30) days after the expiration of the first full year from the date of this agreement and after the expiration of each subsequent full year during the continuance hereof, Principal will pay to Agent as commission for the sale of all motor oils and greases delivered to said station by Principal and sold during such year by Agent, an amount determined by the quantity sold in accordance with the schedule of quantity discounts then being offered by Principal to its dealer purchasers.

7. Agent will remit to Principal for all gasoline and motor fuel sold at said service station an amount which shall be equal to the sale price thereof as fixed by Principal, less commissions at the rates herein provided payable with respect to such sales.

Agent will remit to Principal for all motor oils and greases sold at said service station an amount which shall be Principal's regular dealer price then in effect unaffected by any quantity discount.

When Principal makes a delivery of gasoline, motor fuel, motor oils or greases to said station to replace stocks previously on hand, it shall be assumed that the amount represented by the replacement delivery has been sold and Agent will immediately remit to Principal the amount due for sales made as shown by the replacement deliveries.

[fol. 104] At any time and from time to time, whenever Principal elects, it shall take an inventory of the stocks of gasoline, motor fuels, motor oils and greases on hand at said service station and shall present to Agent a statement showing the stock on hand at the last inventory, the subsequent deliveries, the payments, the stock then on hand and the balance due from Agent, and Agent shall immediately remit to Principal the amount of the balance due.

Should Agent fail to make any payment when due, it shall be cause for the termination by Principal of the employment of Agent, and Principal may withhold the amount due from the amount then or thereafter payable to Agent under and by virtue of this agreement and under and by virtue of any other agreement between Principal and Agent.

8. Principal shall have access to the station at all times for the purpose of taking inventory, inspecting its equipment and products, inspecting the character of service rendered by Agent and the general appearance of the station.

9. Agent shall reimburse Principal for any merchant's license or any other tax, license or charge which any Federal, State or Municipal law or ordinance requires Principal to pay with respect to the maintenance or operation of said service station or its equipment or with respect to the merchandise there sold. Agent agrees to pay for all water, light, power and heat used at said premises and to reimburse Principal for any cost thereof which Principal may be required to pay. Agent will not purchase any supplies or equipment therefor on credit of Principal. Agent will replace at his own cost all or any of the property, equipment, machinery, furniture, appliances or facilities of said service station supplied to him by Principal which may be lost, stolen, destroyed, broken or damaged, ordinary wear and tear only excepted, and said replacement shall be by property of equal value and capable of equal use.

10. Agent will deposit with Principal as security for the payment of any amount which may be due hereunder from Agent to Principal cash, or other security of a kind and amount acceptable to Principal, equal to capacity of the storage facilities at said service station computed at the price, less commissions, which Principal then directs Agent to sell the petroleum products. If at any time the value of the securities so deposited shall depreciate or if an increased quantity of petroleum products shall be stored at said service station, or if the price at which Principal directs Agent to sell the petroleum products shall be increased or if the deposit shall be applied as herein directed, Agent will deposit with Principal any additional cash or security necessary to increase the security to an amount equal to the sale price, less commissions, of the petroleum products stored at said service station. If Agent shall deposit cash,

Principal shall allow Agent interest thereon at 3% per annum while said deposit continues. Principal may apply such deposit or any part thereof or sell such securities either at public or private sale and apply the proceeds thereof or any part thereof at any time to the liquidation of any indebtedness due from Agent to Principal hereunder, and when such deposit or proceeds thereof shall have been so applied by Principal and a statement rendered to Agent, Principal shall not be required to otherwise account to Agent for that part of the deposit so applied. Agent hereby authorizes Principal to withhold and apply to the creation [fol. 105] of said deposit one cent (1c) per gallon from the commissions due to the Agent hereunder.

11. Agent acknowledges he has read the list of equipment furnished by Principal which is attached hereto and marked Schedule "A" and hereby acknowledges the receipt and possession thereof.

12. Agent agrees to hold Principal harmless for any and all claims, damages or loss of any kind or character whatsoever which may arise or are occasioned by the operation of said service station whether said damage or loss is sustained by Agent, his agents, employees or by persons other than parties to this contract or to the property of any of said persons.

13. It is agreed that the relationship between the parties is that of Principal and Agent and that all persons employed by Agent are employees of Agent and not of Principal.

14. Either party may terminate this agreement and the employment hereby created by giving three (3) days' notice in writing to the other party of intention so to do.

15. It is understood that Principal holds the premises above described under a lease and that this contract and the employment of Agent shall terminate and end with the termination of said lease for any cause including the exercise by Principal of the options therein granted to it.

16. Upon the termination of this employment for any cause, Agent shall turn over to Principal all gasoline, motor fuels, motor oils and greases then on hand at the station and shall be under duty to account in money to principal

only for such gasoline, motor fuels, motor oils and greases as he has sold and not theretofore accounted for.

17. After petroleum products are delivered by Principal to Agent, Agent assumes all responsibility for loss of or damage to same by reason of leakage, fire, theft, flood, acts of God, or other unaccountable or unexplainable causes, whether of the kind herein enumerated or not.

18. All terms and stipulations heretofore made and agreed to by the parties and all prior negotiations, representations, and statements by the parties hereto in relation to the subject matter or incident thereto or covered thereby are merged in this contract and concerning such matters this contract expresses the final intentions of the parties.

In witness whereof, the parties hereto have executed this instrument the day and year first above written.

Standard Oil Company of New Jersey, by —— ——.

Witness: —— ——.
Witness: —— ——.

Schedule "A".

[fol. 106] Plaintiff's Exhibit G to Bill of Complaint

DS-66-A—BP-240.
Revised 6-10-31.

Standard Oil Company of New Jersey

Lease of Petroleum Vending Privileges

(Rental Determined by Sales)

This agreement, made this — day of —— in the year 193-, by and between ——, hereinafter called Lessor, and Standard Oil Company of New Jersey, hereinafter called Lessee.

Witnesseth: Lessor does hereby demise and lease unto Lessee the exclusive right to store and sell gasoline, motor fuels, motor oil, grease and other petroleum products, all of which are hereinafter referred to collectively as Petroleum Products, on the premises in the Town of ——, County of ——, State of ——, described as follows:

Lessee shall have the exclusive right and privilege of maintaining and using pumps, tanks and other facilities for the storage, sale and delivery of petroleum products and the servicing of automobiles at the places on said premises where pumps, tanks and other facilities are now located on said premises. Lessee shall also have the exclusive use and occupancy of an office and storage space — feet long and — feet wide, located at the —— of the building on the premises herein described. Lessee shall also have the exclusive use and possession of the machinery, tools, furniture and appliances which are listed in the schedule hereto attached and marked Schedule "A". Lessee, its employees, agents, customers, and those having business with it shall have full, free and unrestricted ingress to, egress from and access to and use of all the spaces and facilities hereby leased to Lessee.

To hold the premises hereby demised unto Lessee for the period of one year beginning on the — day of ——, 193-, and ending on the — day of ——, 193-. Lessee paying therefor as rental each month an amount equivalent to one cent for each gallon of gasoline and other motor fuels sold during the month at said premises by Lessee, its agents or assigns. Payments of said rental are to be made on or before the tenth day of the month following the month in which the rental is earned. Lessee shall keep such books and records as will accurately show the number of gallons of gasoline and other motor fuels sold at the demised prem- [fol. 107] ises and will permit Lessor to examine and inspect such books and records at any time and from time to time when Lessor desires so to do.

The above letting is on the following terms, conditions and covenants, to wit:

1. Lessor will not store or sell or permit anyone other than Lessee and its employees, agents or assigns to store or sell any petroleum products of any kind whatsoever at the premises herein described or in the streets adjacent thereto.

2. Lessee shall pay the specified rent at the times and in the manner provided.

3. Lessor agrees to pay all taxes and assessments now or hereafter levied against said premises. Should Lessor fail to pay such taxes or assessments when due and payable,

Lessee shall have the right to pay the same and may withhold from any rentals payable hereunder as they accrue, such amounts as may be necessary to fully reimburse Lessee.

4. Lessee may install, move and remove at and from the premises hereby leased to it such tanks, pipes, pumps, equipment, machinery and other facilities for the storing, handling and selling of petroleum products and servicing automobiles as shall in its opinion be necessary in order to use said premises for its business of storing, handling and selling of petroleum products. Lessee may paint the tanks, pumps, machinery and other equipment installed or operated by it, and may paint the buildings on the premises herein described in any colors it shall elect, and to paint thereon any of its trade marks and other signs, devices and advertisements.

5. Upon the expiration or termination of this lease for any cause, Lessee is to return the property described in Schedule "A" hereto attached to Lessor and Lessee shall restore said premises to the condition existing on the date hereof, ordinary wear and tear excepted. Lessee shall have the right to remove from said premises all tanks, pumps, pipes, equipment, machinery and other facilities placed thereon by Lessee.

6. In case the premises are rendered unfit for occupancy by fire, storm, explosion or any other cause, no rental shall accrue or is to be paid from the beginning of such unfitness for occupancy until the premises are put in tenantable condition and Lessee is able to and does occupy said premises for the purposes herein described.

7. Lessee during the term of this lease or any renewal or extension thereof shall have the right and privilege to sublet or assign all or any part of its right under and to said premises, but any such subletting or assignment shall not relieve Lessee from its obligation to pay the rent herein reserved unless Lessor shall consent in writing to such subletting or assignment.

8. Lessee shall have the privilege and option of renewing this Agreement from period to period for — additional periods of one (1) year each, the first of such periods to begin on the expiration of the first period herein granted,

and each successive period to begin on the expiration of the period then in effect, upon the same terms and conditions [fol. 108] as herein set forth and all of said privileges of renewal and extension shall be considered as having been exercised unless Lessee gives Lessor notice in writing at least thirty days prior to the expiration of the period then in effect of its intention not to exercise such renewal privilege.

9. Lessee has and is hereby given the right to cancel this lease at any time on giving Lessor thirty days' notice of Lessee's intention so to do.

10. Any notice to be given by Lessee to Lessor shall be sufficiently given if in writing and delivered to Lessor or mailed, Postage prepaid, to Lessor at the premises herein described or at such other address as may at any time be furnished by Lessor to Lessee.

In witness whereof, the parties hereto have executed this agreement the day and year first above written.

—— ——, Lessor.

Witness: —— ——.

Standard Oil Company of New Jersey, by —— ——, Branch Manager.

Witness: —— ——.

(Incorporate here the acknowledgment of Lessor in the statutory form of the state where the leased property is situated.)

Consent of Landowner

Th undersigned hereby consents to the subletting of the Lessor's rights in accordance with the above agreement. Lessor named in the above mentioned agreement defaults in any of the terms or conditions of the lease or other agreement under which said Lessor holds the above described premises, the undersigned will advise the Standard Oil Company of New Jersey at —— of said default, and said Standard Oil Company of New Jersey shall have the option, to be exercised at any time within ten (10) days after the receipt of said notice, but shall not be obligated, to make good said default on the part of the above mentioned Lessor, and the undersigned agrees that so long as the Standard Oil Company of New Jersey thereafter com-

plies with the terms of said agreement under which the above mentioned Lessor acquired said premises, its rights in and to the property under this agreement shall be valid and remain in full force and effect.

Dated this — day of ——, 19—.

Schedule "A".

[fol. 109] PLAINTIFF'S EXHIBIT H TO BILL OF COMPLAINT

DS-66-B—BP-2041.
Revised 8-1-32.

Commission Agency Agreement

This agreement, made and entered into this — day of ——, 193-, by and between Standard Oil Company of New Jersey, hereinafter designated "Principal," and ——, of the City of ——, State of ——, hereinafter designated "Agent":

Witnesseth:

1. Principal, having heretofore acquired the exclusive right to store and sell gasoline, motor fuels, motor oil, grease and other petroleum products, all of which are sometimes hereinafter referred to collectively as Petroleum Products, on the premises in the Town of ——, County of ——, and State of ——, which said premises are sometimes hereinafter referred to as the Station, described as follows:

does hereby employ agent to superintend, manage and operate its business of selling petroleum products and servicing automobiles at said premises.

2. Agent agrees during the term of his employment to sell, handle, deal in, advertise and dispense only the petroleum products delivered to him by Principal and that he will not sell, handle, deal in, advertise or dispense petroleum products of any other manufacturer, jobber or agent unless such products are delivered to him by Principal.

3. Agent agrees to operate said business and station in compliance with the rules, regulations, directions and manuals of Principal and in a manner satisfactory to Principal and of which Principal shall be the sole judge,

and will keep said station open for business during such hours as Principal shall specify.

4. Agent agrees to sell at said station all petroleum products at the prices and upon the terms to be from time to time fixed and determined by Principal and that he will not extend any credit unless previously authorized so to do by Principal. Should Agent make any credit sales without being previously so authorized to do by Principal, said sales shall be for his account alone. When Agent makes any sale on credit previously authorized by Principal, he [fol. 110] shall take from the customer a signed receipt for such sale and shall forward all such signed receipts to Principal. As soon after the end of each month as practicable, Principal will remit to Agent or credit Agent's account with the amount Principal is entitled to receive with respect to the sales shown by such receipts to have been made by Agent on credit authorized by Principal.

5. Principal will pay to Agent or allow Agent to deduct as herein provided on sales, other than those to commercial consumers, at said station at the price established by Principal at said station a commission of two and one-half cents (2½c) per gallon on Esso and a commission of two and one-half cents (2½c) per gallon on "Standard" gasoline. If the difference between the Principal's regularly posted retail tank wagon price reduced by the posted discount allowed to dealers, exclusive of tax, at its bulk plant from which said station is supplied for Esso or "Standard" gasoline and the price, exclusive of tax, at which Principal directs Agent to sell Esso or "Standard" gasoline is less than three cents (3c), then the commission payable as provided in this paragraph shall be reduced by one-half of the amount such difference between said retail tank wagon price reduced by the posted discount allowed to dealers and price at which Principal directs Agent to sell is less than three cents (3c).

Principal during the term of the employment of Agent agrees to pay Agent or allow Agent to deduct as herein provided on all sales on credit to commercial consumers at prices below those established at said station by Principal for sales on credit to other kinds of consumers, a commission of one cent (1c) per gallon on all Esso, and a commission of one cent (1c) per gallon on all "Standard" gasoline.

Within thirty (30) days after the expiration of the first full year from the date of this agreement and after the expiration of each subsequent full year during the continuance hereof, Principal will pay to Agent as commission for the sale of all motor oils and greases delivered to said station by Principal and sold during such year by Agent, an amount determined by the quantity sold in accordance with the schedule of quantity discounts then being offered by Principal to its dealer purchasers.

6. Agent will remit to Principal for all gasoline and motor fuel sold at said station an amount which shall be equal to the sale price thereof as fixed by Principal less commissions at the rates herein provided payable with respect to such sales.

Agent will remit to Principal for all motor oils and greases sold at said station an amount which shall be Principal's regular dealer price then in effect unaffected by any quantity discount.

When Principal makes a delivery of gasoline, motor fuel, motor oils or greases to said station to replace stocks previously on hand, it shall be assumed that the amount represented by the replacement delivery has been sold and Agent will immediately remit to Principal the amount due for sales made as shown by the replacement deliveries.

At any time and from time to time, whenever Principal elects, it shall take an inventory of the stocks of gasoline, motor fuels, motor oils and greases on hand at said station and shall present to Agent a statement showing the stock on hand at the last inventory, the subsequent deliveries, the payments, the stock then on hand and the balance due [fol. 111] from Agent, and Agent shall immediately remit to Principal the amount of the balance due.

Should Agent fail to make any payment when due, it shall be cause for the termination by Principal of the employment of Agent, and Principal may withhold the amount due from the amount then or thereafter payable to Agent under and by virtue of this agreement and under and by virtue of any other agreement between Principal and Agent.

7. Principal shall have access to the station at all times for the purpose of taking inventory, inspecting its equipment and products, inspecting the character of service rendered by Agent and the general appearance of the station.

8. Agent shall reimburse Principal for any merchant's license or any other tax, license or charge which any Federal, State or Municipal law or ordinance requires Principal to pay with respect to the maintenance or operation of said service station or its equipment or with respect to the merchandise there sold. Agent agrees to pay for all water, light, power and heat used at said premises and to reimburse Principal for any cost thereof which Principal may he required to pay. Agent will not purchase any supplies or equipment therefor on credit of Principal. Agent will replace at his own cost all or any of the property, equipment, machinery, furniture, appliances or facilities of said service station supplied to him by Principal which may be lost, stolen, destroyed, broken or damaged, ordinary wear and tear only excepted, and said replacement shall be by property of equal value and capable of equal use.

9. Agent will deposit with Principal as security for the payment of any amount which may be due hereunder from Agent to Principal cash, or other security of a kind and amount acceptable to Principal, equal to the capacity of the storage facilities at said service station computed at the price, less commissions, which Principal then directs Agent to sell the petroleum products. If at any time the value of the securities so deposited shall depreciate or if an increased quantity of petroleum products shall be stored at said service station, or if the price at which Principal directs Agent to sell the petroleum products shall be increased or if the deposit shall be applied as herein directed, Agent will deposit with Principal any additional cash or security necessary to increase the security to an amount equal to the sale price, less commissions, of the petroleum products stored at said service station. If Agent shall deposit cash, Principal shall allow Agent interest thereon at 3% per annum while said deposit continues. Principal may apply such deposit or any part thereof or sell such securities either at public or private sale and apply the proceeds thereof or any part thereof at any time to the liquidation of any indebtedness due from Agent to Principal hereunder, and when such deposit or proceeds thereof shall have been so applied by Principal and a statement

rendered to Agent, Principal shall not be required to otherwise account to Agent for that part of the deposit so applied. Agent hereby authorizes Principal to withhold and apply to the creation of said deposit one cent (1c) per gallon from the commissions due to the Agent hereunder.

10. Agent acknowledges he has read the list of equipment furnished by Principal which is attached hereto and marked Schedule "A" and hereby acknowledges the receipt and possession thereof.

[fols. 112-115] 11. Agent agrees to hold Principal harmless for any and all claims, damages or loss of any kind or character whatsoever which may arise or are occasioned by the operation of said service station whether said damage or loss is sustained by Agent, his employees or by persons other than parties to this contract or to the property of any of said persons.

12. It is agreed that the relation between the parties is that of Principal and Agent and that all persons employed by Agent are employees of Agent and not of Principal.

13. Either party may terminate this agreement and the employment hereby created by giving three (3) days notice in writing to the other party of intention so to do.

14. It is understood that Principal holds the right to store any petroleum products at the premises above described under a lease and that this contract and the employment of Agent shall terminate and end with the termination of said lease for any cause including the exercise by Principal of the options therein granted to it.

15. Upon the termination of this employment for any cause, Agent shall turn over to Principal all gasoline, motor fuels, motor oils and greases then on hand at said station and shall be under duty to account in money to Principal only for such gasoline, motor fuels, motor oils and greases as he has sold and not theretofore accounted for. Agent shall also turn over to Principal all pumps, tanks, furniture, equipment, appliances and facilities listed in the Schedule "A" attached hereto.

16. After petroleum products are delivered by Principal to Agent, Agent assumes all responsibility for loss of or damage to same by reason of leakage, fire, theft, flood,

acts of God, or other unaccountable or unexplainable causes, whether of the kind herein enumerated or not.

17. All terms and stipulations heretofore made and agreed to by the parties and all prior negotiations, representations, and statements by the parties hereto in relation to the subject matter or incident thereto or covered thereby are merged in this contract and concerning such matters this contract expresses the final intention of the parties.

In witness whereof, the parties hereto have executed this instrument the day and year first above written.

Standard Oil Company of New Jersey, By —— ——.

Witness: —— ——.
Witness: —— ——.

Schedule "A".

[fol. 116] PLAINTIFF'S EXHIBIT J TO BILL OF COMPLAINT

Owners and/or Operators of Stores in West Virginia

	No. of stores
Isaac Silver & Bros. Co.	2
Kibler & Co.	2
Kaybee Stores, Inc.	2
Harry Livingston, Inc.	2
Fisher Millinery Corp.	2
Piedmont Stores, Inc.	2
Moskin's Credit Clothing Co. Inc.	2
Pfeffer, Hertz & Aronberg, Inc.	2
Great American Tea Co.	2
Chicago Market Co.	2
American Dollar Stores	2
Eastern Millinery Co.	2
Sherwin-Williams Co.	2
United Cigar Stores of Am.	2
D. A. Schulte, Inc.	2
Whelan Drug Co. Inc.	2
The Premier Vacuum Cleaner Co.	2
White Sewing Machine Co.	2
Dayton Scales Co.	2
J. J. Newberry & Co.	3
Betty Gay Dress Shops	3
Lerner Stores Corp.	3

	No. of stores
Virginia Dare Dresses, Inc.	3
Keystone Shoe Stores	3
F. Fallon	3
Stuart-Faucette Co.	3
American Optical Co.	4
Service Stores Corp.	4
Ira A. Watson Co.	4
The Schiff Co.	4
Dan Cohen Co.	4
Melville Shoe Corp.	4
National Cash Register Co.	4
Burroughs Adding Machine Co.	4
Underwood Elliott Fisher Co.	4
[fol. 117] Moskin Stores	5
Liberty Market Co.	5
National Supply Co.	5
D. D. Fitzgerald & Co.	6
Sands & Co.	6
United Woolen Mills Co.	7
Montgomery Ward & Co.	7
Oil Well Supply Co.	7
J. C. Penny Co.	8
Dunlop Tire & Rubber Co.	8
G. R. Kinney Co.	8
Buxton & Landstreet Co.	9
A. W. Cox Dept. Store Co.	9
Kroger Grocery & Baking Co. (Virginia Corp.)	10
P. H. Butler Co.	10
General Stores Co.	10
S. S. Kresge Co.	11
O. J. Morrison	11
Junior Mercantile Co.	12
C. F. Adams Co.	13
Union News Co.	14
J. G. McCrory	15
Virginia Supply Co.	15
New River & Pocahontas Stores	15
Koppers Stores, Inc.	18
Blue Bird Stores	19
G. C. Murphy Co.	20
F. W. Woolworth & Co.	22
Kroger Grocery & Baking Co. (Ohio Corp.)	79
The Great Atlantic & Pacific Tea Co.	206

[fol. 118] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR TEMPORARY RESTRAINING ORDER—
Filed June 29, 1933

To Fred L. Fox, Defendant herein:

Please take notice that the undersigned will move this Court at the court room in the Post Office Building in the City of Bluefield, and State of West Virginia, on the 29th day of June, 1933, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, for a temporary restraining order against said defendant, his servants, attorneys, agents and privies from paying over into the treasury of said state, pursuant to the requirements of section 10 of House Bill No. 112, enacted into law by the Legislature of West Virginia on March 8, 1933, effective from passage, the sum of Two Hundred Forty Thousand One Hundred Seventy Three Dollars and Fifty Cents ($240,173.50), heretofore paid to said defendant by the plaintiff herein under written protest and duress, said sum being the license tax required by the defendant to be paid by the plaintiff under the color of the provisions of said Act and being now held intact by the defendant as a separate and segregated fund, or from enforcing and executing any of the other provisions of said act against the plaintiff, pending a hearing and determination of an application for an interlocutory injunction to be presented at the same time, on the ground that irreparable and imminent loss, injury, and damage will otherwise result to the plaintiff for which no adequate and complete remedy at law exists, and for such other and further relief as may be just. A verified bill of complaint with supporting exhibits and affidavits will be filed at the stated time.

[fol. 119] June 24, 1933.

H. D. Rummel, Attorney for Plaintiff. Office Address: Rummel, Blagg & Stone, Security Bank & Trust Bldg., Charleston, West Virginia.

Legal service of the foregoing notice of motion accepted this 24th day of June, 1933.

Fred L. Fox, Tax Commissioner of the State of West Virginia.

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed June 29, 1933

Now comes the Standard Oil Company of New Jersey, a corporation, the plaintiff in the above entitled cause, and moves this Court, upon its notice of motion for temporary restraining order and acceptance of service thereof by the defendant herein on the 24th day of June, 1933, and upon its verified bill of complaint and exhibits filed herein, that a temporary restraining order be granted against Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, the defendant herein, his servants, attorneys, agents and privies, pending the hearing and determination of the application for an interlocutory injunction by the plaintiff, as provided for in Section 266 of the Judicial Code, as amended (U. S. Code, Title 28, Section 380), enjoining them from paying over into the State Treasury of said state, pursuant to the requirements of Section 10 of House Bill No. 112 (entitled "An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof,") enacted into law by the Legislature of West Virginia on March 8, 1933, effective from passage, the sum of Two Hundred Forty Thousand One Hundred Seventy-Three Dollars and Fifty Cents ($240,173.50), heretofore paid to said defendant by the [fol. 121] plaintiff herein under written protest and duress, said sum, constituting the license tax required by the defendant to be paid by the plaintiff under color of the provisions of said House Bill No. 112, now being held intact by the defendant as a separate and segregated fund, on the ground that irreparable and imminent loss, injury, and damage will otherwise result to the plaintiff for which no adequate and complete remedy at law exists, and for such other and further relief as may be just.

Dated June 29th, 1933.

H. D. Rummel, A. G. Stone, D. O. Blagg, Solicitors for Plaintiff.

[fol. 122] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed June 29, 1933

Now comes the Standard Oil Company of New Jersey, a corporation, the plaintiff in the above-entitled cause, and moves this Court, on the verified bill of complaint and exhibits filed herein, for an interlocutory injunction restraining Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, defendant herein, his servants, attorneys, agents and privies, from paying over into the State Treasury of said State, pursuant to the requirements of Section 10 of House Bill No. 112, entitled "An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof", enacted into law by the Legislature of West Virginia on March 8, 1933, effective from passage, the sum of Two Hundred Forty Thousand One Hundred Seventy-three Dollars and Fifty Cents ($240,173.50), heretofore paid to said defendant by the plaintiff herein under written protest and duress, said sum being the license tax required by the defendant to be paid by the plaintiff under the color of the provisions of said Act and being now held intact by the defendant as a separate and segregated fund, or from enforcing and executing any of the other provisions of said Act against the plaintiff, and requests that the application for the interlocutory injunction be heard before a statutory district court of three judges as pre-
[fol. 123] scribed by Section 266 of the Judicial Code, as amended (U. S. Code, Title 28, Section 380), the said interlocutory injunction to continue in force until the final hearing before said statutory district court of three judges as prescribed by said statute.

Plaintiff further requests that a time, date and place be set for the hearing of this application for an interlocutory injunction before said statutory district court of three judges, pursuant to which five days' notice of the hearing

may be given immediately to the governor and to the attorney general of said state and to the defendant herein.

Dated June 29, 1933.

H. D. Rummel, A. G. Stone, D. O. Blagg, Solicitors for Plaintiff.

[fol. 124] In United States District Court

[Title omitted]

Temporary Restraining Order—June 30, 1933

This cause came on to be heard upon the motion and application of the Standard Oil Company of New Jersey, a corporation, the plaintiff in the above-entitled cause, for a temporary restraining order and an interlocutory injunction against Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, the defendant in the above cause, his servants, attorneys, agents, and privies, on its notice of motion for temporary restraining order and acceptance of service thereof by said defendant on the 24th day of June, 1933, and on its verified bill of complaint and exhibits filed herein, and it appearing to this Court that said bill of complaint seeks an interlocutory injunction and a perpetual injunction restraining the enforcement, operation, and execution of an Act of the Legislature of West Virginia, known as House Bill No. 112, passed at a regular session thereof on March 8, 1933, effective from passage, entitled "An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof," by restraining the acts of said Fred L. Fox, Tax Commissioner of said State, in the enforcement and execution of said House Bill No. [fol. 125] 112, and more particularly restraining the payment over into the State Treasury, pursuant to Section 10 of said House Bill No. 112, the sum of Two Hundred Forty Thousand, One Hundred Seventy-three Dollars and Fifty Cents ($240,173.50), heretofore paid into the said Tax Commissioner by the plaintiff herein under written protest

and duress, said sum, constituting the license tax required by said Tax Commissioner to be paid by the plaintiff under color of the provisions of said statute, now being held intact by said Tax Commissioner as a separate and segregated fund, upon the ground of the unconstitutionality of said statute, as provided by Section 266 of the Judicial Code, as amended (U. S. Code, Title 28, Section 380), it is ordered, adjudged and decreed as follows:

1. The Honorable George W. McClintic, Judge of the above Court, hereby calls to his assistance to hear and determine the application for an interlocutory injunction in this cause the Honorable ——, Judge of the Circuit Court of Appeals for the —— Circuit, and the Honorable ——, Judge of the ——.

2. It is further ordered, adjudged and decreed that said defendant appear and show cause, if any he has, on the 11th day of September, 1933, at ten o'clock in the forenoon of said day, at the federal court room in the Federal Building, in the City of Charleston, State of West Virginia, why an interlocutory injunction should not issue as prayed for in said bill of complaint, enjoining said defendant, his servants, attorneys, agents, and privies from paying over said sum into the State Treasury.

3. After hearing arguments of counsel for plaintiff and defendant, and it appearing that there is danger of immediate and irreparable injury, loss and damage being caused to the plaintiff before the hearing and determination of its application for interlocutory injunction, unless said defendant, his servants, attorneys, agents and privies are, pending such hearing and determination, restrained as herein set forth, for the reason that the said defendant [fol. 126] has declared to the attorneys and representatives of the plaintiff his intention to pay over into the State Treasury on the 1st day of July, 1933, the said sum heretofore paid to the defendant by the plaintiff under written protest and duress, as aforesaid, and for the further reason that no adequate and complete remedy at law is provided by said House Bill No. 112, or by any other statute of said State, for the recovery of license tax moneys paid under protest pursuant to the provisions of said House Bill No. 112, or for the recovery of interest on the moneys so paid, for for obtaining satisfaction of any judg-

ment or decree which may be rendered in this Court against the defendant for the recovery of said tax moneys unless such payment over into the State Treasury is restrained, it is further ordered, adjudged and decreed that said Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of said State, the defendant herein, his servants, attorneys, agents and privies, be enjoined from praying over into the State Treasury of said State the sum of Two Hundred Forty Thousand One Hundred Seventy-Three Dollars and Fifty Cents ($240,173.50) until the hearing and determination of said application for an interlocutory injunction.

4. It appearing further that the defendant, Fred L. Fox, State Tax Commissioner of West Virginia, has the moneys mentioned in this cause on deposit to the account of "Fred L. Fox, State Tax Commissioner, Special Account, Chain Store Tax", in The Kanawha Valley Bank, The Charleston National Bank, The Kanawha Banking and Trust Company, The National Bank of Commerce, of Charleston, and The Home National Bank, of Sutton, West Virginia, in varying amounts, it is ordered that the said defendant, Fred L. Fox, State Tax Commissioner, may, if he so desires, keep said moneys on deposit in said banks, until the further order of the Court.

5. This temporary restraint is on condition that a bond be filed by the plaintiff herein in the sum of $5,000.00, conditioned upon the payment of such costs and damages as [fol. 127] may be incurred or suffered by the defendant, or by any other person who may be found to have been wrongfully enjoined or restrained thereby.

[fol. 128] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME TO FILE ANSWER—July 24, 1933

This day came the plaintiff by H. D. Rummel, it- attorney, and the defendant, by Homer A. Holt, his attorney, and filed the stipulation of the plaintiff that the time for filing the defendant's answer be enlarged until August 15, 1933; and cause being shown and upon motion of parties, it is ordered that the time for filing the answer of the defendant in this cause be and it is hereby enlarged until August 15, 1933.

[fols. 129 & 130] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO ENLARGEMENT OF TIME—Filed July 24, 1933

It is hereby agreed and stipulated by the plaintiff, by H. D. Rummel, its attorney, that the time for filing the answer of the defendant may be, and hereby is, enlarged until August 15, 1933.

Standard Oil Company of New Jersey, by Counsel.
H. D. Rummel, Solicitor.

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS THE BILL—Filed Aug. 14, 1933

The defendant in the above-entitled action now files his motion and hereby moves to dismiss the above-entitled action and to dismiss plaintiff's bill of complaint on file in said action upon each and every of the following grounds:

I.

The said bill of complaint does not allege, state, or make [fol. 132] out such a cause as to entitled the plaintiff to the relief prayed for or to any relief whatsoever.

(a) The bill of complaint does not allege or state facts showing that the plaintiff is deprived of property without due process of law.

(b) The bill of complaint does not allege or show that the plaintiff is denied the equal protection of the laws.

II.

The complainant has a complete and adequate remedy at law, and this Court has no power to grant the relief asked for in the bill of complaint.

III

The alleged Federal questions are frivolous and insubstantial.

IV

The defendant Fred L. Fox in his individual right is not a real and substantial party in interest and there is no real and substantial diversity of citizenship shown by the bill.

V

Upon the facts stated in said bill this Court has no jurisdiction of the cause because the action is in substance and effect and in truth an action against the State of West Virginia.

VI

The bill does not state facts showing that the plaintiff will suffer irreparable injury by reason of any of the matters and things in said bill set forth and averred.

[fol. 133] Wherefore, the defendant prays that said action and said bill of complaint be dismissed and that he have and recover judgment for his costs incurred herein.

Homer A. Holt, Attorney General. Ira J. Partlow, Assistant Attorney General. R. Dennis Steed, Acting Assistant Attorney General.

[fol. 134] In United States District Court

[Title omitted]

Answer of Fred L. Fox, in His Individual Right and in His Official Capacity as Tax Commissioner of the State West Virginia—Filed Aug. 14, 1933

[fol. 135] To the Honorable George W. McClintic, Judge of said Court:

This defendant, not waiving his motion heretofore filed herein to dismiss the bill, but insisting thereon, and now and at all times hereafter saving and reserving to himself all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections, and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or to so much thereof as the defendant is advised is material that he should answer, answers and says:

I

Defendant admits the allegations in paragraph I of the bill contained.

II

Defendant admits the allegations in paragraph II of the bill contained.

III

Defendant denies that the plaintiff is threatened with imminent and irreparable loss, injury, and damage and is without adequate and complete remedy at law therefor, and says that the plaintiff is not threatened with any such injury, loss, and damage, but that if the plaintiff be threatened with any injury, loss, or damage, the plaintiff has an adequate and complete remedy at law therefor.

IV

The defendant admits, as averred in clause (a) of paragraph IV of the bill that the allegations of the bill, if true and well founded, would present a question under the laws and Constitution of the United States, but defendant denies that the enforcement of House Bill No. 112 is, in [fol. 136] fact, violative of Section 1, of the Fourteenth Amendment to the Constitution of the United States or of any other Constitutional provision of the Constitution of the United States, and denies that the enforcement of said Act would deprive the plaintiff of its property without due process of law, or deny to the plaintiff the equal protection of the laws. (b) The defendant admits that the plaintiff and the defendant, in his individual right, are respectively, citizens of different states, but denies that this Court has any jurisdiction on the ground of diversity of citizenship, and says that said House Bill No. 112 is a Constitutional enactment and that if said House Bill No. 112 be a Constitutional enactment this suit is, in reality, a suit against the State of West Virginia, and that the suit against the defendant as Tax Commissioner of the State of West Virginia is a suit against the State of West Virginia, and that the defendant in his individual right is not an essential or material party to this cause.

(c) The defendant admits that the matter in controversy, exclusive of interest and costs, exceeds the sum or value of three thousand dollars.

V

The defendant admits the allegations of paragraph V of the bill.

VI

The defendant admits the allegations of paragraph VI of the bill.

VII

The defendant admits the allegations of paragraph VII of the bill.

VIII

The defendant is without full knowledge as to all of the allegations in paragraph VIII of the bill contained and, therefore, neither admits nor denies the same.

[fol. 137] IX

Defendant says he is likewise without full knowledge with respect to all of the allegations in paragraph IX of the bill contained with respect to the history of the business of the plaintiff and the places from which the petroleum products of the plaintiff are distributed, but the defendant expressly admits the allegations in said section contained wherein the plaintiff alleges that during the past three years, at its said service stations in the State of West Virginia, the plaintiff has had for sale automobile accessories and supplies, including tires, inner tubes, storage batteries, and other incidental repair and replacement parts, but expressly denies that the plaintiff's business in this regard is limited, and says that although the stocks therefor at the individual service stations may be limited as to quantity, the plaintiff has facilities for the ready replacement of such stocks and that in this respect the plaintiff has held itself out to be ready, willing, and able to supply all reasonable demands, and, in fact, has supplied the usual demands upon its said service stations for such accessories, and supplies, including tires, inner tubes, storage batteries, and other incidental repair and replacement parts, without

limitation. Defendant says that he is without knowledge of the purpose of the plaintiff in having for sale such accessories and supplies, and does not deny that a purpose may have been to render more adequate service to the traveling public at said stations, but denies that such was the only purpose, and avers that the principal purpose of the plaintiff therein was to engage in that commercial activity for profit to itself. The defendant is without knowledge as to the manner of purchase and requisition of such accessories and supplies within the organization of the plaintiff company's business.

[fol. 138] The defendant says that he does not have full knowledge of the manner in which the plaintiff's business is managed and supervised in the various counties of the State of West Virginia, but says that it may be true that the manner is as alleged in said paragraph of the bill; likewise the defendant says that he does not have full knowledge as to the volume of business done in said State of West Virginia by the plaintiff during the years 1930, 1931, and 1932, and, therefore, neither admits nor denies the allegations of the plaintiff's bill with respect thereto, but avers that said allegations, if true, are immaterial.

X

The defendant, on information, admits that the products of the plaintiff are distributed and sold to the consuming public through five classes of outlets and vending places, as set forth in paragraph X of the bill, to-wit:

(1) Service or filling stations owned or leased by the plaintiff and operated by it.

(2) Bulk distributing plants operated primarily as supply depots or warehouses, but from some of which products are sold at wholesale and/or retail.

The defendant, on information, avers that while such bulk distributing plants may be operated primarily as supply depots or warehouses, a very substantial part of the goods, wares, and merchandise distributed therefrom is sold at wholesale and/or retail.

(3) Service stations leased to the plaintiff and operated by lessor or other person in control of premises under com-

mission contracts made with plaintiff, (in the bill called "leased outlets").

[fol. 139] The defendant avers that while such service stations may, in a purely physical sense, be operated by the lessor or other person in control of the premises, the same are operated by the lessor or such other person in control of the premises as the agent of the plaintiff and that the operation of such service station is, in fact, by the plaintiff, through its agents, as appears from Exhibits "E" and "F" filed with the plaintiff's bill.

(4) Vending privilege outlets at which plaintiff acquires by lease the right to store and sell its products and which are operated by the lessor or other person in control under commission contracts.

The defendant avers that while such vending privilege outlets may, in a purely physical sense, be operated by the lessor or other person in control under such commission contracts, yet the lessor or such other person operates such vending privilege outlets as the agent of the plaintiff as appears from Exhibits "G" and "H", and the operation thereof is, in fact, the operation of the plaintiff. And

(5) Service stations and vending places owned and operated by independent dealers.

The defendant does not have full knowledge with respect to the method of the plaintiff's operations prior to the year 1922, but on information says that he believes that the method was substantially as set forth in the bill.

The defendant says, with respect to the allegations pertaining to (1) service or filling stations owned or leased by the plaintiff and operated by it, that he admits that beginning with about the year 1922 the State of West Virginia entered upon an extensive program of highway con-[fol. 140] struction and that the use of motor vehicles for transportation of persons and freight increased rapidly; that the defendant is not fully advised as to the reasons why the plaintiff, upon the extensive use of the roads, provided stations for the refueling and servicing of motors vehicles at various and important centers of population, but admits that the plaintiff did so provide such stations for the refueling and servicing of motor

vehicles, and, upon information, avers that the principal reason therefor was that the plaintiff desired to more widely extend its commercial operations for profit to itself. The defendant is without knowledge as to the number of such service stations which the plaintiff has operated from the year 1922 to 1932, respectively, but believes that the figures set forth in the bill are substantially correct.

Defendant, likewise, admits as substantially true and correct, the general description of a typical service or filling station owned or leased by the plaintiff and operated by it, as set forth in the bill.

The defendant says that he is not advised beyond the allegations of the plaintiff's bill concerning the percentage of revenue derived from such service stations from the sale of petroleum products and the percentage derived from the sale of automobile accessories and supplies.

The defendant admits as substantially true the averments of the bill relating to (2) bulk or distributing plants, and admits that the distribution of petroleum products constitutes the principal business at such bulk distributing plants, but avers that the sales of automobile accessories and supplies therefrom is no inconsiderable item.

The defendant admits as substantially true the allegations of the bill with respect to (3) leased outlets, and particularly admits that it is true, as alleged in the bill that [fol. 141] the plaintiff's lessor or other person conducts the physical operation of such leased outlets as the agent of the plaintiff.

The defendant admits as substantially true the allegations of the bill with respect to (4) vending privilege oulets, and especially admits the relationship between the plaintiff and the operators of leased outlets and vending privilege outlets are substantially the same, and are the same in that the physical operators of vending privilege outlets, as the physical operators of leased outlets, are the agents of the plaintiff, but the defendant denies that the distribution of petroleum products of the plaintiff is merely incidental to the principal business carried on at such place by the owner or other person in control thereof, and avers that the distribution of the petroleum products of the plaintiff is the business of the

plaintiff conducted by the owner or other person in control thereof as the agent of the plaintiff. And the defendant, on information, avers that the interest of the plaintiff in such vending places lies not only in the distribution of its petroleum products therefor but, likewise, in the sale of automobile accessories and supplies.

Defendant, likewise, admit- that the petroleum products of the plaintiff are sold by various (5) independent dealers, as averred in the bill, but the defendant says that under the provisions of said House Bill No. 112 he has not required of the plaintiff the inclusion of such independent dealers in the application of the plaintiff for "store licenses", and the plaintiff has not paid him the taxes therefor.

XI

Defendant admits that the plaintiff has heretofore paid all ad valorem, property, privilege, license, franchise and special taxes of every kind levied and laid against it by the State of West Virginia and by the political subdivisions thereof, including:

[fol. 142] (1) An annual license tax payable to the State of West Virginia under the provisions of sections 69 and 71, Article 12, Chapter 11, Code of West Virginia;

(2) A business and occupational tax payable to the State of West Virginia under the provisions of Section 2, Article 13, Chapter 11 of the Code of West Virginia; as alleged in clauses "(1)" and "(2)" of paragraph XI of the plaintiff's bill.

Likewise, the defendant admits that the plaintiff has paid an annual license tax amounting to five dollars for each distributing station or place of business or agency in the State of West Virginia at or from which gasoline is sold for resale or distribution or at which gasoline is produced, refined or compounded, and amounting to one dollar for each filling station or place of business in the State of West Virginia from which gasoline is sold at retail, as imposed under the provisions of Section 2, Article 14, Chapter 11 of the Code of West Virginia, but the defendant expressly denies that the plaintiff has paid the excise tax provided by Section 3, Article 14, Chapter 11 of the Code of West Virginia, being an equivalent of four cents per gallon upon the quantities of gasoline sold or used in the State. In denying that

the plaintiff has paid said excise taxes amounting to four cents per gallon of gasoline sold, the defendant does not deny that the plaintiff has delivered to the State of West Virginia the moneys equivalent to four cents per gallon of gasoline sold but the defendant expressly avers that said excise tax is a consumer's tax, and that the plaintiff is merely the means of collecting said consumer's tax from those who use or consume the gasoline, and attention is particularly directed to Section 17, Article 14, Chapter 11 of the Code of West Virginia, wherein it is provided that the excise tax imposed in this article, when accrued and while in the hands of the distributor, retail dealer or im-[fol. 143] porter, shall be the property of the State of West Virginia, held in trust; and attention is further directed to Section 20, Article 14, Chapter 11 of the Code wherein it is provided that refund of tax on gasoline used for the certain purposes therein specified is made to the purchaser and not to the seller thereof.

Defendant further says that the annual license tax is in reality no more than a registration fee for the distributing stations, filling stations and places of business from which gasoline is sold as an aid and incident to the collection of the excise or consumer's gallonage tax.

The defendant says further, upon information and belief, that at all places at which the gasoline of the plaintiff is sold in the State of West Virginia there are posted publicly and conspicuously the prices for which the several gasoline productions of the plaintiff are sold, showing separately the plaintiff's price therefor per unit, and, in addition thereto, the State tax thereon, as well as the United States tax thereon.

A true copy of Article 14, Chapter 11 of the Code of West Virginia relating to the gasoline tax is filed herewith marked for identification Exhibit "A" and asked to be taken and read as a part of this answer.

The defendant admits that the plaintiff has paid the (4) motor vehicle license and permit fees required by Article 6, Chapter 17 of the Code of West Virginia; and (5) the property taxes to the State and to the various political subdivisions thereof. As to the payment of (6) license fees to municipalities this defendant is not advised. This defendants admits that the plaintiff has paid (7) license fees for dispensing alcohol.

The defendant says that he is not fully advised as to the schedule of taxes and license fees alleged to have been paid by the plaintiff and as set forth on page 23 of the bill, and, therefore, neither admits nor denies the accuracy thereof, [fol. 144] except that for the reasons hereinabove stated, the defendant expressly denies the payment by the plaintiff of the amount set forth under item "3" thereof "License tax on filling stations and bulk distributing stations paid to State of West Virginia, measured at flat rates upon each such place and upon the quantities of gasoline sold, purchased or used * * *" for the year 1930, $2,560,558.68; for the year 1931, $2,283,268.13; for the year 1932, $1,818,476.84. In making such denial this defendant is aware that such sums have probably been transmitted to the State of West Virginia by the plaintiff, but avers that so much thereof as does not represent the so-called "Annual License Tax" under Section 2, Article 14, Chapter 11 of the Code, which, according to the number of bulk station plants and filling stations operated by the plaintiff for the year 1932, as shown by Exhibit "D" with said bill, amounts to $1,219.00, was not paid to the State of West Virginia by the plaintiff as money of the plaintiff or to which the plaintiff was entitled in any way, but merely as money belonging to the State of West Virginia, collected on behalf of the State of West Virginia from the purchasers of such gasoline from the plaintiff, and this defendant expressly denies that the plaintiff as a taxpayer has paid to the State of West Virginia for the year 1932, the sum of $1,963,262.57, but says that, assuming the statements of the plaintiff to be otherwise correct, the plaintiff has paid $1,817,259.84 less than that amount, or the sum of only $146,002.73, and that, likewise, the amounts of taxes which it is averred in the bill the plaintiff has paid to the State of West Virginia for the years 1930 and 1931 should be diminished by so much thereof as represents the gallonage tax on gasoline sold by the plaintiff.

And the defendant expressly denies that the ratio of taxes to gross revenue for the year 1932 is 19.2% as averred by [fol. 145] the plaintiff, or was, for the years 1930 and 1931, 18% and 19.4%, respectively, as so averred by the plaintiff, and the defendant avers that the gallonage tax received on behalf of the State of West Virginia by the plaintiff was at no time a part of the gross revenue of the plaintiff, but

on the contrary, assuming the plaintiff's figures to be otherwise correct, the percentage of taxes paid by the plaintiff to gross revenue received by the plaintiff for the year 1932 was only approximately 1½%.

This defendant says that he is not advised whether the ratio of taxes and license fees paid by the plaintiff for the year 1932 will be diminished for the year 1933, except for the taxes as required by said House Bill No. 112, but admits that the percentage by the payment of the taxes required by said House Bill No. 112 will be increased, but this defendant denies that said percentage so increased will even approximate 21.6% but, on the contrary, says that said percentage will not exceed four per cent.

This defendant denies that the taxes imposed upon the plaintiff by the various laws of the State of West Virginia, including House Bill No. 112, are undue or unreasonable or constitute a burden upon the plaintiff or its earnings any more than other taxes are burdensome, and expressly denies that such taxes will amount to a confiscation or a taking of the properties of the plaintiff in violation of any law of the United States or of the State of West Virginia.

Defendant admits that the maximum license tax imposed upon any store of the plaintiff under said House Bill No. 112 is $250.50, and, likewise, admits that as of the effective date of said Act, the average license tax and filing fee as applied to the plaintiff is approximately $240.00.

This defendant says that he is not advised as to whether the plaintiff's volume of business as a whole for the current [fol. 146] year will be less than such volume has been for the preceding three years; likewise, defendant is not advised whether or not it is true, as alleged in the bill, that a substantial number of service stations owned or leased by the plaintiff showed a net operating loss for the year 1932 and for the first five months of the year 1933; and, likewise, the defendant is not advised as to whether the average license tax under said House Bill No. 112 as applied to the plaintiff's stores is equal to or in excess of fifty per cent of the average net operating income per station for the year 1932; and the defendant particularly observes that it is not alleged in said bill that such tax is equal to or in excess of fifty per cent of the aggregate net operating income of all of such stations, but that such averment is made only in respect to the case of many such stations; the defendant

denies that the enforcement of House Bill No. 112 will amount to any confiscation of the capital and assets of the plaintiff, either substantially or otherwise.

Defendant says that he is not advised concerning the net operating revenue for the year 1932 of the various leased outlets and vending privilege outlets operated by the plaintiff or whether such net operating revenue was more or less than $240.00 per year for certain of those outlets; likewise the defendant is not advised whether the plaintiff contemplates canceling the lease or leases relating to various of such outlets, but the defendant says that regardless of the manner in which the plaintiff may continue to operate its business, whether by expansion or contraction, the operation of said House Bill No. 112 is not and will not be destructive or confiscatory of any property or property rights of the plaintiff.

The defendant says that the plaintiff operates its numerous filling stations and bulk plants and outlets as a comprehensive system for the sale and distribution of its products and not as a series of individual enterprises; that the [fol. 147] plaintiff so operates its retail stations and outlets as to create as great a general market as is possible for the products which the plaintiff manufactures itself and which the plaintiff buys from others for resale, and that the defendant is informed, believes, and, therefore, avers that the plaintiff's method of business is to operate its general system and to determine its success or failure from the results of the operation of the general system rather than from the results of the operation of individual outlets, and that by charging itself at an outlet with its wholesale price on such goods, the operation of an individual unit may show a loss and yet such loss is more than offset by the profit which the plaintiff makes as a producer and refiner of such products sold by it at such wholesale prices.

The defendant is not advised as to the other properties and property rights of the plaintiff referred to in Section XI of the bill, nor as to the net book value of the various properties of the plaintiff, but, on information, the defendant admits that the plaintiff has good will of value within the State and has in its employ a good operating personnel, but the defendant denies that the operation and execution of House Bill No. 112 will impair or destroy the value of the plaintiff's property or property rights any

further than that taxes of every and all characters are burdensome.

The defendant on information admits that the products sold by the plaintiff in the State of West Virginia are of good quality and that the service stations and outlets operated by the plaintiff are convenient to motorists, and the defendant denies that any operation of House Bill No. 112, as applied to the plaintiff or to other oil companies similarly situated, will be to materially diminish the number of such outlets and service stations to the injury of the plaintiff or to the inconvenience of the motoring public, and, on information, avers that so long as a supply of petroleum [fol. 148] exists in the land the motoring public will not be inconvenienced by the absence of stores from which gasoline and other petroleum products may be purchased.

XII

Defendant admits that for many years prior to the advent of the modern gasoline filling station the plaintiff and its predecessor company were engaged in the refining, manufacturing and distribution of petroleum products, and that in the earlier days of motor transportation, the plaintiff, with its predecessor company, sold petroleum products to local garage owners, and independent wholesale and retail dealers, and to commercial and industrial consumers.

The defendant says that he is not fully advised of the extent to which the entrance of the plaintiff and other companies engaged in like business in the field of distribution of petroleum products through company-operated service stations and contract outlets has resulted in the displacement of independent owners and operators of service stations, but the defendant, on information and belief, says that such operations of the plaintiff and other companies have necessarily, to a considerable extent, supplanted and displaced the independent operations of such independent owners and operators, which fact appears from the plaintiff's bill and exhibits filed therewith, with respect to leased outlets and vending privilege outlets, aggregating 848 stores and places of business in connection with which and as the result of the methods of business of the plaintiff such independent local owners and operators of service stations became the agents of the plaintiff as distinguished from

independent local owners and operators on their own responsibility and for their own profit and benefit.

[fol. 149] The defendant says it may be true that the wide ownership and use of motor vehicles incident to the establishment of modern highways has been a moving cause for the establishment of numerous places for the refueling and servicing of such vehicles, but the defendant says, on information and belief, that such facts merely present an opportunity for the plaintiff and other companies engaged in a similar business, and that in truth and in fact the moving cause for the entry of the plaintiff in the service station business was the desire of the plaintiff for profit from the retail sale of petroleum products and automobile accessories and supplies, the opportunity for which was afforded by the increased demand for and the wide use of such products and commodities. And the defendant does not aver that there was any illegality in the purpose of the plaintiff, the plaintiff having the right to engage in commercial ventures as well as any other person, firm, or corporation, except so far as the great extension of the plaintiff's business tends towards monopolization, and the defendant does not admit that the operation by the plaintiff of its 101 service stations and its 848 outlets has not placed at any disadvantage whatsoever the various independent local dealers in petroleum products and automobile accessories and supplies within the State, but, to the contrary, says that the operations of the plaintiff and others tend towards monopoly to the extent that their operations in reality set the prices and standards uniformly for independent operators, to that extent limiting their individual independence in operation, and the defendant says, on information and belief, that in fixing the retail price for its products for its own service stations and outlets the plaintiff also fixes the retail price at which its products may be sold by such independent local dealers as remain in business. The defendant does not admit that no person is deprived by the plaintiff of the opportunity to engage in the distribution [fol. 150] of petroleum products of the plaintiff and/or any other company and of servicing motor vehicles, but says that by reason of the great quantity of business and mass process of distribution, the unlimited captial, the pricing and sales policy, the substantial control of supply, the high specialization and standardization, and other pertinent fea-

tures of the plaintiff's operations, not as a matter of law but as a matter of fact, independent operators may engage in such business only upon such terms and conditions as may, from time to time, be prescribed by the plaintiff and other like oil companies, and that by reason of the very extensive operations of the plaintiff and other like oil companies in monopolizing a very large percentage of the key points of distribution throughout the State, very little opportunity remains to the independent operator to successfully establish and maintain a similar establishment.

Defendant denies that the business of distributing petroleum products and of servicing motor vehicles is not within the spirit and purpose of said House Bill No. 112, but expressly avers that not only is such business within the letter of said House Bill No. 112, but is, as well, within the essential spirit and purpose thereof.

Defendant expressly denies that said House Bill No. 112 does not include gasoline filling or bulk distributing stations within the provisions of the license tax provision thereof. The allegations of the plaintiff's bill with respect to Section 8 of the Act defining the word "store" are not entirely correct and do not set forth the complete definition of "store" provided by said section. Said Section 8 provides:

"The term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, [fol. 150a] maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale."

From which it readily appears that the term "store" includes any store or stores or any mercantile establishment or establishments in which goods, wares or merchandise of any kind are sold, either at retail or wholesale. The defendant denies that the language of said Act indicates that it was not the Legislative intent to impose said license taxes and fees upon service stations or bulk plants belonging to the plaintiff or upon the said leased outlets and vending privilege outlets, and expressly affirms that the intent to impose the tax on such establishments is expressed in clear and unequivocal terms; that it is true that stores or mer-

cantile establishments are places where the essential business carried on is the sale of general articles of trade and commerce, either at wholesale or retail, and the defendant expressly avers that gasoline and petroleum products are general articles of trade and commerce, and that, perhaps with the exception only of bread and meat, gasoline and petroleum products are articles in connection with which trade and commerce are most general throughout the land and throughout the State of West Virginia.

Defendant admits that the stores at which gasoline and petroleum products are sold to the motoring public have a particular appellation, which is frequently used, namely "service station", but that this phrase is not exclusive of the general term as used in said Act, "stores"; that certain other well-known establishments likewise have particular names as "pharmacies", "meat shops", "lumber yards", "plumbing shops", and numerous others, none of which are [fol. 150b] exclusive of the general phrase "stores", but all of which are comprehended therein; that such special appellations are merely the particularization of the general phrase and not the exclusion thereof, and that all are included within the term "store" as defined in the very broad terms of Section 8 of said House Bill No. 112; and this defendant denies that the phraseology "stores" or "mercantile establishments" affords no justification for the interpretation as above-mentioned that the Act is applicable to filling stations, leased outlets, and vending privilege outlets of the plaintiff, and expressly affirms that the definition of stores as provided in said Act is so comprehensive as to leave no ground for interpretation by this defendant as Tax Commissioner but to make it his clear duty to rule, as he has done, that filling stations and outlets of the plaintiff are "stores" and that the same are subject to the tax provided by said Act.

The defendant says that it may be true that the bulk distributing plants of the plaintiff are largely supply depots and warehouses for the plaintiff's retail establishments but that sales at wholesale therefrom are made without restriction to independent dealers and to others, and that as well sales are made on the premises.

Plaintiff avers in its bill that it was not the legislative intent to interpret said license taxes or fees as imposed upon service stations or bulk plants belonging to the plain-

tiff, which averment the defendant expressly denies, and in support of his denial files herewith as "Exhibit B" a true copy of the official Journal of the Senate of the State of West Virginia at the session thereof at which said House Bill No. 112 was enacted, from which it appears that motions were introduced for the purpose of amending said Act so as to expressly exclude such filling stations and bulk plants from the operation thereof, but that such amendments were rejected after debate thereon, and the defend- [fol. 151] ant says that such proceedings show clearly the legislative intent, which the defendant avers is not only shown by the intent of the legislative bodies but that said intent was aptly phrased and expressed in the language of the enactment itself.

Defendant denies that there is any existent legislative recognition in West Virginia of the fact that gasoline filling stations are not stores or mercantile establishments within the meaning of said House Bill No. 112. Defendant admits that filling stations are mentioned in Section 2, Article 14, Chapter 11 of the Code of West Virginia, and that distributing stations are likewise therein mentioned, but denies that said Act declares in any way that such filling stations or distributing stations are not stores within the meaning of said House Bill No. 112. The defendant here again says that such taxes as are mentioned in Section 2, Article 14, Chapter 11 of the Code of West Virginia (Exhibit "A" herewith) are in fact mere registration charges in connection with the collection of the gallonage tax on gasoline, but that even if such collections be regarded as taxes rather than registration fees, they are mere taxes on the sale of a particular article and not taxes imposed on filling stations and distributing stations of gasoline as "stores". Such taxes are merely taxes upon the sale of one particular type of goods, wares, and merchandise, that is to say, gasoline alone, and that under the laws of West Virginia, and, as defendant is advised, under the laws of many states, even prior to the enactment of a general store tax such as said House Bill No. 112, special taxes in many instances have been imposed upon the sale of particular articles such as the sale of tobaccos, the sale of drugs, and the sale of many luxuries too numerous here to mention; in all of which cases the defendant avers that such tax is a tax upon the sale of the article and not a tax upon the

operation of the establishment, and defendant avers that [fol. 152] there is no repugnancy of any character between the collection of such tax upon the sale of the particular article, gasoline, and the collection of a further tax upon the operation of the store or establishment at which such products, along with other goods, wares, and merchandise, are sold, as a general store tax.

Defendant again expressly denies that the State gallonage tax of four cents per gallon is a tax upon the plaintiff, but avers that the same is a tax upon the purchaser or consumer of gasoline.

Defendant admits that the plaintiff has heretofore paid the taxes required of it by the State of West Virginia, but denies that the plaintiff has paid any tax repugnant to or as a substitute for the tax required under House Bill No. 112 as a general tax for the operation of a store at which, as appears from the plaintiff's bill, not only gasoline but other petroleum products are sold, and as well, other articles of goods, wares, and merchandise, particularly automobile accessories and supplies.

Defendant expressly denies that the action of the defendant in enforcing against the plaintiff the provisions of said chain store tax Act (House Bill No. 112), while at the same time collecting the license taxes imposed under Sections 2 and 3, Article 14, Chapter 11 of the Code of West Virginia, is violative of any principle of statutory construction under which double taxation of the same property, privilege or right is never presumed to be the legislative intent, or under any other principle of statutory construction, and expressly denies that the collection of said separate taxes in any sense is double taxation and avers that the tax provided by Section 2, Article 14, Chapter 11 of the Code is a mere registration fee or a tax upon the sale of a particular article, while the tax provided by said House Bill No. 112 is a tax upon the operation of a store, regardless of the character of the articles sold thereat, whether or not all or any part of such articles so [fol. 153] sold thereat, require, in addition thereto such special taxes for the sale of the particular articles.

XIII

The defendant admits and avers that it is true that in certain instances the Courts of the United States and of

the several States have upheld the validity of chain store tax legislation similar in some respects to House Bill No. 112, and the defendant says further that he is informed, believes, and, therefore, avers that in so far as any questions presented in this cause as arising under the Constitution of the United States are concerned, the questions presented in such previous cases are the same as those which are attempted to be here presented by the plaintiff's bill, and that the decisions of the Supreme Court of the United States therein have been uniformly adverse to the contentions here made by the plaintiff. Defendant says that it is true that in such cases previously considered certain factual situations incident to the chain store system of merchandising and alleged to result in economic advantages were considered, but the defendant denies that any particular individual factual situation was deemed wholly determinative by the courts in such previous cases, and avers that in such cases none of the separate points discussed in paragraph XIII of the plaintiff's bill were regarded as determinative, but the basic factor recognized by such previous decisions was that the conduct of a chain of stores, considering the various incidents of operation collectively, constitutes a form and method of merchandising quite apart from that adapted to the practice of ordinary individually-operated small stores or department stores, and that the difference between an integrated and a voluntary chain, is fundamental. That while incidents in the operation of the one may be quite similar to those [fol. 154] found in the other, there is a clear distinction between one owner operating many stores and many owners each operating his own store with a greater or less measure of cooperation voluntarily undertaken. The legislature may make the distinction the occasion of classification for purposes of taxation. Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination of "chain store operation" as a method of merchandising reasonably distinguished from other methods of merchandising. The defendant denies that in extending its distribution system and in the acquisition of filling stations and outlets, the plaintiff and its predecessor company have not been prompted or inspired by the advantages of the "chain store system" or

of multiple operation; and the defendant denies that advantages do not inhere in such method of operation.

Defendant denies that the extensive operations of its service stations and outlets by the plaintiff have not resulted in any increased opportunities to the plaintiff in quantity buying and the mass process of distribution. Defendant says that in so far as petroleum products are concerned the plaintiff is a producer and refiner thereof, and avers that the increased operation of its service stations and outlets has resulted in increased opportunity in the way of production and has resulted in an increase in the distribution of plaintiff's products, and, as well, has resulted in increased opportunities for quantity buying of automobile accessories and supplies and other articles of merchandise sold by the plaintiff.

Defendant admits that in opening its own service stations and operating its leased outlets the plaintiff may have been prompted by (1) the necessity of providing for the frequent refueling and servicing of motor vehicles, (2) the necessity of guaranteeing to the consuming public that products sold at said leased outlets are the products of the [fol. 155] plaintiff, and (3) the competition of other major oil companies; but defendant denies that any of such reasons were the underlying reason or reasons for the extension of the plaintiff's system of distribution, and avers that the fundamental reason for such extension was the cultivation and extension of the market for plaintiff's products produced and bought, and the increase of earnings to the plaintiff; that the extension of plaintiff's business in this respect is not unlike extension of any other commercial enterprise in that the extension of enterprises, other than eleemosynary enterprises, are prompted by the desire and prospects of bigger and better business. Defendant denies that the establishment of service stations and leased outlets and vending privilege outlets by the plaintiff has not resulted in acquiring a new market for the plaintiff at the expense of or to the detriment of independent local operators, and denies that such has not substantially increased the number of places at which the products of the plaintiff are distributed, and denies that the volume of the plaintiff's products sold in the State has not been increased thereby, and says that if the actual volume of the plaintiff's products so sold in the State has

not been increased thereby, such volume has been saved and protected from material reduction on account of other massed competition. Defendant expressly denies that the effect of the extension of outlets operated by the plaintiff has not been to displace the local independent operator or to place him upon unequal terms, but avers that each filling station leased by the plaintiff, and each vending privilege outlet acquired by the plaintiff results in the displacement of one independent operator, and that thereby the one who was previously an independent operator becomes the agent or employee of the plaintiff.

Defendant says further that by the wide extension of its retail distributing places the plaintiff is not only en- [fol. 156] abled to fix, but does in fact fix, the wholesale price at which it delivers its products to independent owners, and at which it charges its agency establishments with such products, but that the plaintiff also fixes the retail prices at which not only its distributing points sell such products, but also the prices at which such independent operators as remain sell such products.

Defendant denies that the plaintiff does not enjoy, by reason of its chain system of operation, an advantage corresponding to that of buying for cash at a discount, but defendant says that so far as plaintiff purchases from others the goods, wares, and merchandise which it sells, it enjoys this advantage and, in so far as the distribution of its own products is concerned, the plaintiff is enabled to receive the cash for its ultimate sales much more promptly than under the ordinary methods employed by distributors with independent local operators; that on account of the plaintiff's extensive and specialized operations it is able to achieve superior skill and technique in operation, as well as skill in buying the articles distributed by the plaintiff and not produced by it; that the plaintiff derives advantage from the distribution from a single warehouse to numerous stores, the same as any other chain store, and defendant denies that there is anything in the inherent character of the products distributed by the plaintiff which prohibits advantages resulting from the storage and warehousing methods which are possible only in connection with the chain store method of operation.

Defendant says that the plaintiff is not only a producer, but a retailer of a considerable part of the merchandise

sold by it; that the plaintiff does enjoy an abundant supply of capital and on account of the plaintiff's being both a producer, refiner, and retailer of gasoline products, it enjoys the peculiar advantage of being in a position to operate some outlets at an apparent loss as a retailing propo- [fol. 157] sition, while at the same time such apparent loss is more than offset by the profit which the plaintiff acquires as the refiner or producer of the very same product, so that on the plaintiff's operations as a whole it may profitably operate while an independent dealer selling the plaintiff's products at the same retail price might operate at a loss.

Defendant again denies that the plaintiff's operations by the chain store system do not afford plaintiff an advantage in connection with its pricing and sales policy and do not furnish plaintiff an advantage of greater turnover with the possibility of slightly lower prices, though defendant admits that the element of slightly lower prices is of very little consequence inasmuch as he avers that by reason of the plaintiff's methods of operation it has been able to and does fix its prices with no competitive or other restraint, and defendant avers that plaintiff's advantages in this connection are the same as the advantages of any chain store system.

Defendant denies that the plaintiff does not have the advantage of uniform and cheaper and better advertising for an entire chain in a given locality, and expressly avers that the plaintiff does have such advantage.

Defendant denies that the plaintiff and its predecessor company have at all times specialized and concentrated upon the production, distribution and sale of petroleum products, and denies that there has been no change in this policy since the acquisition of the service stations and the operation of said leased outlets and vending privilege outlets, but, to the contrary, says that as appears from plaintiff's bill, until recent years, the plaintiff dealt exclusively in petroleum products, and while the chief products in which the plaintiff yet deals may be petroleum products, yet the advantages which accrued to the plaintiff operating as a chain system have been so great that the plaintiff [fol. 158] has extended the character of products handled by it from the original of petroleum products to automobile accessories and supplies, including tires, tubes and

batteries which constitute an extensive trade, and to automobile repairs and parts generally.

Defendant says that he is not advised with what difficulties the plaintiff may have attained its present degree of standardization of its service stations and outlets, but avers that the plaintiff in operating its chain system does enjoy and profit by all such advantages of standardization as are incident to the operation of any other chain store system.

The defendant here further generally denies that the plaintiff does not profit by all of the advantages discussed under paragraph XIII of its said bill of complaint, that is, quantity buying and the mass process of distribution, buying for cash at a discount, skill in buying, distribution from single warehouse to numerous "stores", abundant supply of capital, pricing and sales policy involving greater turnover and slightly lower prices, unified, cheaper and better advertising for an entire chain in a given locality, specialization, and advantages of standardization, but to the contrary says that the plaintiff does profit from such advantages and that regardless of the extent of any such advantages individually, the plaintiff's method of business is well and thoroughly distinguished, both in fact and in law, from other methods and policies of store operators, and particularly independent store operators, as distinguished from chain store operators, and that the system and manner of the plaintiff's doing business is a proper subject matter for reasonable classification for any and all proper purposes of taxation.

XIV

The defendant expressly denies that House Bill No. 112 violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in [fol. 159] that if construed to be applicable to the plaintiff it would deprive the plaintiff of its property without due process of law, and deny to it the equal protection of the laws in the particulars alleged in the bill:

(a) Defendant admits that the said Act is primarily a tax measure, but denies that the Act has nothing to do with the exercise of the police power of the State, and

it may be true that said Act has no immediate relation to the public health, public morals, or the public safety, but the defendant avers that the Act, in addition to providing a substantial revenue to the State of West Virginia, has a direct and immediate relation to the general welfare of the State of West Virginia in that the defendant is advised, believes, and, therefore, avers that it is the policy of the sover-ign State of West Virginia to encourage individual enterprise and thrift; that the welfare of the State of West Virginia is dependent upon the welfare of her citizens and that the general welfare of her citizens is bettered by the encouragement of individual enterprise and responsibility of business ownership and operation within the State, and that the condition of the State is bettered by fostering conditions under which a great number of citizens may be engaged in individual enterprises upon their own responsibility rather than that such citizens be engaged in such enterprises as the mere agents or employees of a limited number of giant commercial enterprises. Defendant admits that there is no provision in said Act for regulation, supervision or inspection of the businesses subject to the tax.

Defendant expressly denies that said House Bill No. 112, as a tax measure, in operation and effect is not equal and uniform, and expressly denies that the classifications made by the terms of the act are oppressive, prohibitory, unreasonable, arbitrary, discriminatory, or confiscatory as [fol. 160] to the plaintiff or as to any other person, firm, or corporation similarly circumstanced.

(b) The defendant admits that the classifications upon which the taxes imposed by said Act are based rest wholly upon the number of stores owned, operated, maintained, and/or controlled by the same person, firm, or corporation, but expressly denies that the taxes so imposed are increased unequally, disproportionately, unreasonably and arbitrarily, and in such manner as to burden, oppress, prohibit, and discriminate against the ownership or ultimate management of two or more stores, and unreasonably, unequally, and disproportionately to discriminate against, oppress, burden, and penalize the employment of capital, skill, and efficiency by the plaintiff and others similarly situated, if such there be; and particularly to hinder and prevent the plaintiff from increasing the num-

ber of outlets for the sale of petroleum products, but to the contrary the defendant expressly avers that the provisions of said Act are equal and uniform as to any and all persons, firms and corporations similarly circumstanced, and that the classifications upon which said taxes are imposed by said Act are reasonable and well established in fact and in law.

Defendant admits that the tax rates are correctly stipulated in said section (b) of paragraph XIV of the plaintiff's bill, but the defendant expressly denies that the classifications fixed by said Act rest upon no sound or reasonable basis, and denies that the same are wholly arbitrary and unrelated to the plaintiff's business, but to the contrary again avers that said classifications rest upon a sound, reasonable and well-established factual basis and are not arbitrary either in whole or in part, but are reasonable in their application as related to the plaintiff's business as well as to the business of all others similarly circumstanced.

[fol. 161] Defendant denies that the effect of the graduation of taxes provided by said Act is to discourage and depress the operation of the refineries of the plaintiff, particularly the refinery at Parkersburg, the operation of its trucks and motor equipment, the acquisition of real estate and leaseholds and the construction and operation of service stations thereon, in any reasonable sense of the words, but, whether or not the allegations of the plaintiff's bill with respect thereto be true, the same is true with respect to any lawful plan of taxation.

Defendant is not advised whether the effect of said tax will be a cancellation by the plaintiff of all or any of its outlet contracts, but denies that such result or such effect, if true, will in any way be detrimental to the motoring public, and avers that if the plaintiff cancels its said leases and contracts there will be nothing to prevent those who are now operating the same as agents and employees of the plaintiff from continuing to operate such establishments as independent owners or operators, and with the same demands for supplies upon plaintiff's refinery at Parkersburg, and with the same demand for the operation of plaintiff's trucks and motor equipment, and the petroleum products, and other automobile accessories and supplies may be furnished the motoring public at the same

places at which such supplies are now furnished the public, but by independent operators who are now mere agents or employees of the plaintiff.

(c) The defendant admits that the plaintiff's service stations and outlets are in theoretical competition with the vending places operated by other oil companies and dealers handling the products of other oil companies and with independent dealers distributing the gasoline and other products of the plaintiff, but denies that said competition is in reality practical, and particularly denies that said competition in fact exists between the plaintiff and [fol. 162] independent dealers distributing the products of the plaintiff, inasmuch as, on information and belief, the defendant says that the plaintiff fixes the prices at which the independent dealers distributing the plaintiff's products may sell the same at retail.

The defendant admits that there may be in the State of West Virginia other operators of filling stations who may not be required under said House Bill No. 112 to pay as large a tax as is there required of the plaintiff, but says that the plaintiff's operations greatly exceed the operations of other operators of similar enterprises; and the defendant expressly says that said Act operates with equality and uniformity as to all affected thereby similarly circumstanced; and the defendant expressly denies that the plaintiff is subjected to any excessive, prohibitory, oppressive, and confiscatory tax in addition to any other taxes to which it is subject, and expressly denies that the plaintiff is, by said Act, denied the equal protection of the laws, and expressly denies that said Act amounts to a taking of the plaintiff's property without due process of law; and expressly avers that the levying and collecting of taxes, while in a sense a taking of property, is a taking of property with due process of law, and not without due process of law, inasmuch as legal taxation is due process.

(d) Defendant admits that the classification upon which said tax is based is not the ability of the taxpayer to pay and is not the income or earnings from any service station or vending place, and is not predicated upon receipts, and that the same is not predicated upon profits or losses, and that it is not a tax upon capital employed or invested in the ad valorem sense, but defendant denies that said

tax does not take into account the type of business, but expressly avers that said tax is a tax upon the method of [fol. 163] doing business commonly referred to as the "chain store system"; that said type of business is well defined and readily severably and distinguished from other types of business, whether taxable or not.

Defendant admits that the Act in question makes it unlawful for any person to engage in the lawful business of operating stores and mercantile establishments without the payment of the taxes levied thereunder; the defendand also admits that said Act imposes penalties or fines upon the person, firm or corporation operating such stores and mercantile establishments without the payment of the required taxes, but the defendant avers that the prohibition against doing of business without the payment of the taxes and the penalties for so doing business without the payment of taxes are reasonable and common methods of enforcement of taxes.

Defendant denies that the plaintiff paid the sum of $240,173.50 to the defendant herein under any coercion but readily admits that the plaintiff paid said sum to the defendant under protest.

(e) The defendant denies in toto the allegations in section (e) of paragraph XIV of the plaintiff's bill.

(f) Defendant denies that House Bill No. 112 and the rules of the defendant as Tax Commissioner thereunder make it impossible for the plaintiff to operate its stations and do business under its outlet contracts at a profit, and denies that said Act and the rulings confiscate the profit and capital assets of the plaintiff under the guise of taxation, or in any other manner. Defendant denies that the investments of the plaintiff in the State of West Virginia prevent its withdrawal from the doing of business within the State, but, on information, avers that the business opportunities and profits of the plaintiff in the State of West Virginia are such that the plaintiff does [fol. 164] not desire to withdraw from business in the State of West Virginia and cannot do so without material loss of profit to itself.

Defendant denies that the tax under said House Bill No. 112 as applied to the plaintiff or as applied to any person, firm, or corporation, is prohibitory, confiscatory,

and in practical effect and operation destructive of and takes the property of the plaintiff without due process of law.

(g) Defendant denies that the license taxes and fees required to be paid under said Act are unequal and discriminatory, but, to the contrary, avers that said license taxes or fees are equal and uniform, and apply, alike, to any and all persons, firms, and corporations similarly circumstanced. Defendant denies that said taxes are based upon a classification which is arbitrary and unjust or unreasonably discriminatory, and avers that the classification is one well established in law and in fact, and approved by the courts of final jurisdiction in many States, and by the Supreme Court of the United States.

Defendant denies that the practical effect of said Act is an unfair, oppressive, unequal and unwarranted burden upon the plaintiff and other oil companies similarly circumstanced, if such there be, but, to the contrary, avers that said tax is a reasonable, just, and legal tax. Defendant says that he does not yet have a complete list of all stores and mercantile establishments in the State of West Virginia subject to the provisions of said Act, but will exhibit before the Court any and all information which he may have when deemed material by the Court.

XV

Defendant denies that said House Bill No. 112 violates Section 10, Article III of the Constitution of the State of [fol. 165] West Virginia, and likewise denies that the said Act as applied to the plaintiff violates Section 1, Article X of the Constitution of the State of West Virginia, as amended.

(a) Defendant admits that said Act is essentially, though not wholly, a tax measure but denies that the same provides rates of taxation which are not equal and uniform within the meaning of all of the provisions of the Constitution of the State of West Virginia; that the meaning of the phrase "equal and uniform" as applied to taxation under the Constitution of West Virginia is not abstract equality and uniformity as to taxes other than ad valorem or property taxes, but that under the laws of West Virginia the rule of equality and uniformity in taxation is

fully satisfied by the like application of the taxing laws to all persons similarly circumstanced; that while it may be true that the plaintiff who operates 101 service stations, 54 bulk plants and 848 outlets, may be required to pay per store 125 times as much as the operator of a single store, yet the plaintiff is required to pay no more than, but the same as, any other person, firm, or corporation who operates 1027 stores.

(b) Defendant admits that owners and operators of stores and mercantile establishments are not to be taxed at a uniform rate, graduated in proportion to the volume of business done or to the value of the property owned or operated by them, but avers that such fact is immaterial inasmuch as the tax provided by said House Bill No. 112 is neither a gross sales tax nor an ad valorem property tax. Defendant also admits that the increase upward of such taxes is not in direct proportion to the increase of sales or earnings or to property values, but avers that the same is proportioned to the opportunity of the plaintiff to engage in the store business, and that [fol. 166] the tax is one on the privilege of engaging in a well defined method of business and is reasonably proportionate to the extent to which such method is pursued.

(c) Defendant denies that Section 1, Article X of the Constitution of West Virginia limits classification and graduation of taxation to taxes on incomes alone and, therefore, denies the allegations of the plaintiff in Section (c) of said paragraph XV.

(d) Defendant admits that said Act is a license tax on the privilege of operating stores and mercantile establishments but denies that in practical effect it singles out the business of distributing petroleum products as carried on by the plaintiff and others similarly circumstanced, and denies that it imposes thereon a prohibitory and confiscatory tax. And the defendant avers that said tax operates with equality and uniformity as to all who are similarly circumstanced to the plaintiff.

(e) Defendant admits that said act imposes a license tax upon the plaintiff in addition to the so-called "license tax" assessed under Section 2, Article 14, Chapter 11 of the Code, but denies that such license tax is excessive

and expressly denies that such license tax constitutes a double tax upon the privilege of operating service stations, bulk plants, leased outlets, and vending privilege outlets, but, to the contrary, says that the license tax under said Section 2, Article 14, Chapter 11 of the Code is a mere registration fee incidental to the collection of the gallonage tax on the sales of gasoline within the State of West Virginia, but even if a license tax is a mere license tax on the sale of one particular product, that is to say, gasoline, while the tax of said House Bill No. 112 is a tax upon stores generally, regardless of what articles are sold therein, not exclusive, but inclusive of gasoline, [fol. 167] as well as of any and all kinds of goods, wares, and merchandise, regardless of whether, upon any particular items of such goods, wares, and merchandise, any other special license taxes are imposed. Defendant again denies that the plaintiff pays any license taxes under Section 3, Article 14, Chapter 11 of the Code of West Virginia.

(f) Defendant denies that the provisions of House Bill No. 112, when considered with the provisions of Sections 2 and 3, Article 13, Chapter 11 of the Code of West Virginia, constitutes double taxation of the same privilege or right, but says that the taxes under said Article 13 are taxes upon the amount of business done, while the tax under House Bill No. 112 is a tax upon the privilege of doing any business as the operator of a store or stores.

XVI

Defendant denies that his rulings as Tax Commissioner are violative of, and not warranted by, House Bill No. 112, for the reasons assigned in Section (a), (b), (c), and (d) of paragraph XVI of the plaintiff's bill, or for any other reason.

XVII

Defendant admits that unless he be enjoined and restrained from paying over to the State Treasury the moneys paid him by the plaintiff, he will pay such moneys into the State Treasury; and the defendant neither admits nor denies the allegations under Section (a) of said paragraph for the reason that the assets of the defendant in his individual right are not material in this cause,

but the defendant denies that his payment of such moneys into the State Treasury would work any irreparable loss, damage and injury to the plaintiff, inasmuch [fol. 168] as such payment into the State Treasury would be no more than the transfer thereto of moneys due and properly payable to the State Treasury by the plaintiff.

Defendant admits that at the time of the preparation of this answer said Act has not been interpreted by any Court of West Virginia or of the United States.

And now having fully answered the plaintiff's bill, this defendant further answering, says that the plaintiff is not entitled to any relief prayed for in its said bill, for the reason that said House Bill No. 112 under the provisions of which the plaintiff paid the money involved in this cause to the defendant as State Tax Commissioner of West Virginia, is Constitutional and lawful in every respect, and that the relief prayed for by the plaintiff in said bill is predicated upon no other ground than the alleged unconstitutionality of said Act.

And now, having fully answered the plaintiff's bill of complaint, this defendant prays that the injunctive and any and all other relief prayed for in said bill be denied the plaintiff, and that he may be hence dismissed with his reasonable costs in this behalf expended; and as in duty bound he will ever pray, etc.

Fred L. Fox, in His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia, by Counsel: Homer A. Holt, Attorney General; Ira J. Partlow, Assistant Attorney General; R. Dennis Steed, Acting Assistant Attorney General.

[fol. 169] *Duly sworn to by Fred L. Fox. Jurat omitted in printing.*

[fol. 170] DEFENDANT'S EXHIBIT "A" TO ANSWER

Official Code of West Virginia, 1931

Chapter 11, Article 14

Gasoline Tax

1. Definitions. When used in this article the term "gasoline" shall include the liquid, derived from petroleum or

natural gas, commonly known and sold as gasoline, and distillate, benzine, benzol, naphtha, liberty fuel, casinghead, absorption and natural gasoline and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles, or which is usable for such purpose (and including kerosene, fuel oil, and crude oil only when used as a motor vehicle fuel upon any public highway); the term "person" or the term "company" includes any individual, firm, copartnership, joint adventure, association, corporation, trust and any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context, and, when used in connection with the penalties imposed by this article, shall mean and include the officers, directors, trustees or members of any firm, copartnership, joint adventure, association, corporation, trust, or any other group acting as a unit; the term "distributor" means distributor of gasoline and includes every person who refines, produces, manufactures, compounds or blends gasoline in this State for use or for sale to jobbers or consumers, and every person who is now engaged, or who may hereafter engage, in his own name or in the name of his representative or agent in this State in the selling of gasoline for the purpose of resale or distribu- [fol. 171] tion; the term "retail dealer" means retail dealer in gasoline and includes any person not a distributor within the meaning of the previous clause who sells gasoline in this State to consumers only; the term "importer" means importer of gasoline and includes any person who purchases or obtains gasoline outside this State and uses the same within the State; and the term "motor vehicles" means automobiles, motor trucks, and motorcycles, and includes all other vehicles, movable engines or machines which are operated or propelled by combustion of gasoline or other volatile and inflammable liquid fuels, when operated for travel on public highways.

2. Annual License Tax. Every distributor shall pay an annual license tax of five dollars for each distributing station or place of business or agency located in this State at or from which gasoline is sold for resale or distribution or at which gasoline is produced, refined or compounded, and an annual license tax of one dollar for each filling sta-

tion or place of business in this State from which gasoline is sold at retail; and such license tax shall be payable on or before the first day of July, nineteen hundred and thirty-one, and annually thereafter.

Persons operating tank wagons into this State from places of business located outside this State and selling gasoline in quantities as desired by purchasers in this State without definite orders having been placed prior to the delivery of the product, shall be deemed distributors in this State and shall pay an annual license tax of five dollars on account of each place of business from which tank wagons are so operated.

Every other retail dealer shall pay an annual license tax of one dollar for each filling station or place of business in this State at which gasoline is sold, and such license tax shall be payable on or before the first day of [fol. 172] July, nineteen hundred and thirty-one, and annually thereafter. The privilege granted through the payment of the annual license tax shall be conditioned upon the licensee complying with the requirements of this article pertaining to the filing of statements and the payment of the exercise tax imposed by section three hereof.

It shall be the duty of every person intending to deal in gasoline in this State to make application to the tax commissioner for a license so to do, which application shall be accompanied by the amount of the license tax herein required and shall state whether the applicant intends to engage in such business as a distributor or retail dealer, and shall designate the intended place or places of business. A license certificate for any person commencing business after January first in any year may be issued for the half year upon payment of half the annual license tax herein required. The license certificate shall be posted or displayed and so kept at all times in public view at the place of business for which the same was issued. The license certificates provided for herein shall not be transferable from one person to another nor from one location to another. If any person shall fail, neglect or refuse to pay the license tax herein imposed within the time prescribed, there shall automatically accrue a penalty of fifty per cent thereof, and the tax and the penalty shall be collected as hereinafter provided.

3. Excise Tax. There is hereby imposed, upon every person who is a distributor, retail dealer or importer under the terms of this article, an excise tax based on the quantities of all gasoline sold, purchased or used in this State on and after the first day of January, nineteen hundred and thirty-one (except as herein provided), which tax shall be equivalent to four cents per gallon thereof and shall [fol. 173] be paid as hereinafter provided. A distributor shall use as the measure of the tax the gallonage sold for whatever use in this State (as provided in section four hereof) and the gallonage used by him in motor vehicles operated in this State; a retail dealer shall use as the measure of the tax the gallonage purchased or obtained by him, and an importer shall use as the measure of the tax the gallonage purchased by him for use in motor vehicles to be operated in this State.

The special excise tax imposed by this article shall be paid by the person first selling, or using in this State the gallonage of gasoline which under this article shall form the measure of such tax; but in no case shall any such gallonage be used more than once in determining taxes due hereunder. The taxes imposed by this article are in addition to all other taxes now imposed or prescribed by law.

The excise tax imposed by this article shall accrue from the date of sale or purchase of the gasoline, whichever accords with the method of reporting required by this article, or conforms with the election of the taxpayer in the case of distributors, and the penalties imposed by section thirteen hereof shall accrue from the date they become due and payable, and such taxes and penalties shall be and remain a charge and lien upon the properties, both personal and real, of the person liable to pay such taxes and penalties, superior to any lien created after such taxes and penalties accrue; and no title shall vest or be transferred as to any such property, except subject to the lien for such taxes and penalties, and no such property shall be transferred or delivered, in whole or in part until after payment to the tax commissioner is made of the amount of such taxes and penalties due.

4. Distributor's Monthly Statement; Payment of Tax. [fol. 174] Every distributor selling gasoline in this State shall, within thirty days after the close of each month, transmit to the tax commissioner a statement, verified by

oath or affirmation, on such forms as the tax commissioner shall prescribe, of all gasoline refined, produced, compounded, received, sold, distributed or used by such distributor during the month to be covered, and if any of the gallonage sold or used by such distributor had not previously been included in the measure of tax under the provisions of this article, he shall at the same time pay to the tax commissioner the amount of tax due for such month: Provided, That all gallonage furnished by any distributor to any of its service stations in this State shall be deemed to have been sold and shall be treated and considered, in computing the tax, in the same manner as though the same had been sold to retail dealers or to other persons.

Such statement shall also contain full details as to each sale made, including the gallonage of gasoline shipped from points without West Virginia direct to customers or consignees in West Virginia; the name and address of each purchaser; the date of each shipment or delivery; the point from which shipped or delivered; the point to which shipped or delivered; the quantity of each shipment or sale; the number and initials of the car in which shipped if shipped by rail; the name of the boat or barge if shipped by water; or, if delivered by other means the method of delivery. The statement shall also accurately show the gallonage purchased or received by such distributor during the month; the date each quantity was received; the point from which shipped or delivered; the point at which received; the name and address of the person from whom purchased or obtained; the quantity of each purchase; the number and initials of the car if shipped by rail; the name of the boat or barge if shipped by water; or, if delivered by other means, the method of delivery. The statement shall also contain any additional informa-[fol. 175] tion the tax commissioner may deem necessary for the proper ascertainment and assessment of the tax.

If any distributor is unable to furnish the information called for above, he shall report the quantity of gasoline purchased or obtained during the month and, if any of such gasoline had not previously been included in the measure of tax under the provisions of this article, he shall pay the amount of tax due thereon.

5. Retailer's Statement; Payment of Tax. Every retail realer shall, within thirty days after the close of each

month, transmit to the tax commissioner a statement, verified by oath or affirmation, on such forms as the tax commissioner shall prescribe, of all gallonage received, purchased or obtained by such retail dealer during the month to be covered, which statement shall show the name and address of the person from whom each purchase of gasoline was made; the point from which shipped or delivered; the point at which received; the number and initials of the car if shipped by rail; the name of the boat or barge if shipped by water; or, if delivered by other means, the method of delivery, and the quantity of each purchase. If any of the gallonage purchased or obtained by any such dealer had not been previously included in the measure of tax under the provisions of this article, such dealer shall, at the time of transmitting such statement, pay to the tax commissioner the amount of tax due for such month: Provided, That retail dealers who purchase or obtain gasoline from within West Virginia only shall not be required to transmit such statements monthly, but shall, within thirty days after the close of each six months' period, transmit to the tax commissioner a statement, under oath, or affirmation, on such forms as the tax commissioner shall prescribe, of all gallonage purchased or [fol. 176] obtained by such dealer during the six months' period to be covered.

6. Importer's Monthly Statement; Payment of Tax. Every importer shall, within thirty days after the close of each month, transmit to the tax commissioner a statement, on such forms as the tax commissioner shall prescribe, of all gallonage received by such importer during the month to be covered, which statement shall show the name and address of the person from whom each purchase was made; the point from which shipped or delivered; the point at which received; the date of each shipment or purchase; and the quantity of each shipment or purchase; and he shall at the same time pay to the tax commissioner the amount of tax due for such month.

7. Distributor's Tax May Be Based on Purchases. Any distributor may elect to pay his tax upon the basis of the quantity purchased or received during the month instead of the quantity sold and used. Any distributor required to use or adopting this method of reporting shall not be

allowed to deduct any gallonage on account of losses arising from leakage or evaporation, or other causes.

8. Gasoline Exported or in Interstate Commerce; Distributors May Pay Tax on Shipments into State. This article shall not be construed to require the inclusion, in the measure of tax, of any gasoline when the same is exported from this State to another state or nation, nor to require the inclusion, in the measure of tax of any gasoline shipped in interstate commerce while the same is in transportation; but the gallonage of gasoline shipped from another state shall be included in the measure of tax by the [fol. 177] person first selling or using the same after the same shall have been divested of its interstate character: Provided, That distributors making shipments of gasoline into West Virginia may, as a matter of convenience to purchasers located in West Virginia, assume and pay the tax imposed in this article when permission so to do is first obtained from the tax commissioner.

9. Transportation companies to Furnish Statements. The tax commissioner is authorized and empowered to require every railway or railroad company, water transportation company, and every other person transporting gasoline to points in this State to furnish a statement, on forms which the tax commissioner may prescribe, to be delivered within sixty days after the close of each month, showing all quantities of gasoline delivered at points in West Virginia during the month to be covered, giving the name and address of the consignor; the name and address of the consignee; the point from which shipped; the point at which delivered; the date of shipment; the date of delivery; the number and initials of the car if shipped by rail; the name of the boat or barge if shipped by water; or, if delivered by other means, the method of delivery; and the quantity of each shipment.

10. Non-Resident Shipper to Furnish Statements. Every person domiciled in another state who makes shipments of gasoline consigned to points in West Virginia shall, within thirty days after the close of each month, transmit to the tax commissioner, on such forms as the tax commissioner shall prescribe, a statement, verified by oath or affirmation, of all sales or shipments of gasoline made to points in West Virginia during the month to be covered, showing the name

and address of each purchaser or consignee; the date [fol. 178] of each shipment; the point from which shipped; the point to which shipped; the number and initials of the car if shipped by rail; the name of the boat or barge if shipped by water; and the quantity of each shipment.

11. Statements filed monthly regardless of sales, purchases or tax liability. The statements required in this section and sections four, five, six and nine shall be filed for each month regardless of whether or not the same shows sales or purchases during any month and regardless of whether or not a tax is due.

12. Manner of payment. All payments of taxes imposed by this article shall be made by certified check, cashier's check, bank draft or money order, payable to the tax commissioner.

13. Failure or refusal to make statement or pay tax; penalty. If any distributor, retail dealer or importer fail, neglect or refuse to make any statement required for any month or to pay the excise tax due for any month within the time prescribed for the filing of such statement or the payment of such tax, there shall automatically accrue a penalty equal to one-half of one cent on each gallon of gasoline sold or used during the month or on each gallon purchased during the month, in accordance with the method of reporting required or adopted, the amount of which penalty shall in no case be less than twenty-five dollars (or if no sales or purchases were made, a penalty of twenty-five dollars), such penalty to be paid or collected in the same manner as the tax imposed by this article is required to be paid or collected.

14. Failure or refusal to make statement; power of com- [fol. 179] missioner. If any distributor, retail dealer or importer fail, or refuse to make and file any statement at the time prescribed in this article, or make, willfully or otherwise, an erroneous, false or fraudulent statement, the tax commissioner, or his duly appointed agent, shall make the statement from his own knowledge and from such information as he can obtain through testimony or otherwise. Any statement so made shall be prima facie good and sufficient for all legal purposes.

As a further means of making the statement the tax commissioner or his duly appointed agent, shall have

power to examine the books, records and papers of such distributor, dealer or importer, to ascertain the amount of tax due under the provisions of this article; and, to that end, shall have power to examine witnesses under oath; and if any witness shall fail or refuse to appear at the request of the tax commissioner or his duly appointed agent, or refuse access to the books, records or papers, the tax commissioner or such agent shall certify the facts and names of the witnesses failing or refusing to appear, or refusing access to books or papers, to the circuit court of the county having jurisdiction of the party, and such court shall thereupon issue summons to such party to appear before the tax commissioner, or his agent, at a place designated within the jurisdiction of such court, on a day fixed, to be continued as occasion may require, and give such evidence and lay open for inspection such books and papers as may be required for the purpose of ascertaining the amount of tax, if any, due. From the statement so made the tax commissioner shall determine the amount of tax due, if any, and shall add the penalty provided herein for failure to pay the tax or to file the statement within the time prescribed for the payment of such tax or the filing of such statement and shall notify the distributor, retail dealer or importer, of the amount [fol. 180] of tax and penalty assessed, together with a demand for an immediate payment of the tax and penalty. If such tax and penalty be not paid upon demand, the tax commissioner shall proceed to collect such tax and penalty in the manner hereinafter prescribed.

The tax commissioner, or his duly appointed agent, shall have power to examine the books and papers of any person pertaining to gasoline sales or receipts, to verify the accuracy of any statement made under the provisions of this article, and if access to the books and papers be refused, the tax commissioner shall proceed as above provided. In order that the tax commissioner may have additional means of checking the accuracy of the reports made, and determining the amount of tax due from any person, the books, records and other documents of common carriers, relative to the transportation of gasoline, are hereby declared accessible to the tax commissioner, or his duly appointed agent.

15. Failure, or Refusal to Pay Tax or Penalty; Procedure for Collection. If any distributor, retail dealer or importer, liable for the payment of any excise tax or penalty, fail, neglect or refuse to pay such tax or penalty upon demand from the tax commissioner and for ten days thereafter, it shall be lawful, for the tax commissioner, or his duly appointed agent, to collect such tax and penalty by distraint and sale of the goods, chattels or effects, including stocks, securities and evidences of debt, of the person liable for the payment of such tax and penalty. If goods, chattels or effects *sufficient to pay such* tax and penalty due from such person are not found by the tax commissioner, or his duly appointed agent, the tax commissioner is authorized to collect such tax and penalty by seizure and sale of real estate. Further, the tax commissioner may cause appropriate action for the recovery of such tax and/ [fol. 181] or penalty, or to enforce the lien of the State of West Virginia for tax upon any real estate, to be brought in the name of the State, and it shall be the duty of the attorney general of this State or the prosecuting attorney of any county to commence and prosecute such suit at the request of the tax commissioner, and judgment shall be rendered for the amount found to be due, together with costs, and the amount collected shall be paid into the state treasury: Provided, however, That if it shall be found that such failure to pay was willful on the part of such person, judgment shall be rendered for double the amount of tax and penalty found to be due, with costs. Such suit shall be by notice of motion for judgment, an action in debt or assumpsit, or by any other appropriate remedy under the general law. The license tax imposed by section two of this article and delinquent shall be collected in like manner.

16. Invoice to Purchaser; Effect. A distributor when selling gasoline to any other distributor or to a retail dealer shall render to the purchaser an invoice or ticket dated the day of shipment or delivery of the gasoline and upon such invoice or ticket the distributor so selling shall plainly state whether or not the gallonage of gasoline will be included in the measure of tax to be paid by him, and the person so buying and receiving such gasoline may, as regards his report to the tax commissioner, fully rely upon the statements so made in such invoice.

17. Status of Tax Accrued and Unpaid; Embezzlement Thereof; Bond Indemnifying State Against Loss. The excise tax imposed in this article, when accrued and while in the hands of the distributor, retail dealer, or importer, shall be the property of the State of West Virginia held [fol. 182] in trust. If any person shall willfully fail to pay the tax to the tax commissioner as provided in this article, he shall be guilty of embezzlement of funds, the property of the State of West Virginia, and, upon conviction, he shall be confined in the penitentiary not less than one or more than five years. Further, in any case where it shall be deemed necessary by the tax commissioner, the tax commissioner is authorized to require any distributor, retail dealer or importer to deposit with the tax commissioner a surety bond, to be approved by the tax commissioner as to sufficiency and by the attorney general as to form, indemnifying the State against any loss arising from the failure of the distributor, retail dealer or importer to pay the excise tax for any cause whatsoever.

18. Failure to Pay Tax; Cancellation of License; Enjoining Operation of Business; Violations; Penalties. If any person refuse or fail to pay the excise tax or the penalty, or any part thereof, due for any month upon demand from the tax commissioner and for ten days thereafter, the tax commissioner is empowered to cancel the license or licenses issued to such person under authority of this article. In the case of any person continuing in any activity after the license issued therefor has been cancelled, or in the case of any person engaging in any activity without the payment of the license tax required therefor, the tax commissioner is directed to bring action in the circuit court of the county having jurisdiction of the party with a view to enjoining such person from engaging or continuing in such activity. Further, if any person distributes or sells gasoline after June thirtieth, one thousand nine hundred and twenty-seven, without having paid the license tax imposed in this article and without having at all times conspicuously displayed at his place of business or agency a license certificate evidencing the [fol. 183] payment of such license tax for the then current year or fractional part thereof, or if any distributor, retail dealer, importer, or other person making deliveries of gasoline in West Virginia, or any person required to

file statements under section ten of this article, or the officers, directors, trustees or members of any firm, copartnership, joint adventure, association, corporation, trust or any other group acting as a unit, fail, refuse, or neglect to make the statements required within the time and in the manner prescribed, or who shall refuse to permit the tax commissioner, or his duly appointed agent, to examine the books or papers of such person, pertaining to gasoline sales or receipts, or who makes an incomplete statement hereunder or who fails or refuses to render invoices or tickets as required by section sixteen hereof, or who does, or attempts to do, anything whatsoever to avoid the full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax due, shall be guilty of a misdemeanor, and, upon conviction thereof, fined not exceeding one thousand dollars, or imprisoned not exceeding six months, or both.

If any distributor, retail dealer, importer or any officer, director, trustee or member of any firm, copartnership, joint adventure, association, or corporation, or any member of a group acting as a unit, makes a false or fraudulent statement hereunder, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than five years.

19. Refund for Gasoline Exported or Lost. Any distributor who shall export gasoline from West Virginia to any other state or nation or who shall in the conduct of his wholesale gasoline business sustain losses of gasoline by reason of leakage or evaporation, which gasoline shall have been included in the measure by which the excise tax im- [fol. 184] posed by this article is determined, shall be reimbursed and repaid a sum equal to the amount of such excise tax on the gallonage so exported or lost, upon his presenting to the tax commissioner a sworn statement, on forms prescribed by the tax commissioner, of the quantity of and full details concerning such gasoline exported or lost: Provided, That the tax commissioner shall cause refund to be made under authority of this section only when application for refund as herein provided is filed with the tax commissioner within thirty days after the close of the month during which the gasoline was exported or lost.

20. Refund of Tax on Gasoline Used for Certain Purposes; Penalty for False Claim. Any person who shall buy, in quantities of twenty-five gallons or more at any one time, any gasoline as defined in this article, for the purpose of, and the same is actually used for, operating and propelling boats, aeroplanes, tractors used for agricultural or other purposes, road rollers, steam shovels, compressors, pumps, stationary gas engines, threshing machines or other gasoline-operated machinery, except motor vehicles; or who shall purchase and use such gasoline for cleaning and dyeing or for manufacturing or other commercial uses, except in motor vehicles, which gasoline shall have been previously included in the measure by which the excise tax imposed by this article is determined, shall be reimbursed and repaid a sum equal to the amount of such tax, upon presenting to the tax commissioner an affidavit accompanied by a ticket or invoice from the distributor or retail dealer, showing such purchase, which affidavit shall set forth the total amount of such gasoline purchased and used by such consumer, other than in motor vehicles, operated in this State, and how used; and the tax commissioner upon the receipt of such affidavit and ticket or invoice shall cause to be refunded to such consumer such [fol. 185] tax paid on gasoline purchased and used other than for motor vehicles as aforesaid: Provided, That the tax commissioner shall cause refund to be made under authority of this section only when application for refund, as herein provided, is filed with the tax commissioner, upon forms prepared and furnished by the tax commissioner, within sixty days from the date of purchase or delivery of the gasoline: Provided further, That no refund shall be allowed under authority of this section on gasoline purchased and used for any purpose when the same shall be reused for the purpose of propelling motor vehicles.

21. False or Fraudulent Claim for Refund; Penalty. If any person shall make a false or fraudulent claim for the refunds referred to in sections nineteen and twenty hereof, he shall be guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary not less than one nor more than five years.

22. Taxes to Be Used for Road Purposes; Treatment of refunds. All taxes collected under the provisions of this

article shall be paid into the state treasury and shall be used only for the purpose of the reconstruction, maintenance and repair of roads and highways, and for the payment of the interest and sinking fund on state bonds issued for road purposes. Any moneys received by the State and required to be repaid shall be treated as moneys erroneously paid into the treasury and refunds shall be made and be payable out of the same fund into which paid.

23. Forms and Regulations for Enforcement. The tax commissioner is hereby invested with full power and authority and it is hereby made his duty to prescribe forms for returns and assessments and to make, issue and put [fol. 186] in force all necessary and needful rules and regulations for ascertaining, assessing and collecting the taxes imposed by this article and the enforcement of the provisions thereof.

24. Partial Invalidity. The provisions of this article are severable and if any shall be held unconstitutional the decision of the court shall not affect or impair any of the remaining provisions hereof. It is hereby declared as a legislative intent that this article would have been adopted had said unconstitutional provisions not been included therein.

[fol. 187] DEFENDANTS' EXHIBIT "B" TO ANSWER

West Virginia Legislature

Senate Journal

Regular Session, 1933

Charleston, W. Va.,
Friday, March 3, 1933.

The Senate met at 10 o'clock a. m.

Eng. House Bill No. 112—"A Bill requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof,"

On second reading, coming up in regular order, was read a second time.

The following committee amendment was reported by the Clerk:

On page 6, section 8, line 6, after the word "wholesale", insert the words "Provided, however, That the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products".

The question being on the adoption of the amendment,

On this question, Mr. Hodges demanded the yeas and nays.

The demand being sustained, they were ordered and taken.

Mr. Henderson moved that the announcement of the vote on the adoption of the amendment be postponed until Monday, March 6, at 2 o'clock P. M.

Mr. Herold arose to the point of order that this motion was not in order.

Which point of order the President ruled was not well taken.

[fol. 188] On this question, Mr. Hodges demanded the yeas and nays.

The demand being sustained, they were ordered and taken as follows:

The yeas were:

Messrs. Mathews (President), Abbot, Beneke, Helmick, Helsley, Henderson, Johnson, Neale, Null, Reynolds (of Mercer), Reynolds (of Mineral), Sandridge, White (of Hampshire), White (of Mingo) and Wiseman—15.

The nays were:

Messrs. Brown, Fleming, Garrett, Herold, Hodges, Hyre, Jones, Millender, Mitchell, Myers, Paull, Smith and Taylor—13.

Absent and not voting:

Messrs. Garvin and Weissenburger—2.

So, a majority of those present and voting, having voted in the affirmative, the motion prevailed.

Mr. Reynolds (of Mineral), moved that the bill go over on second reading, retaining its place on the calendar.

Mr. Hodges arose to the point of order that the motion was not in order.

Which point of order the President ruled was not well taken.

The question being upon the motion of Mr. Reynolds (of Mineral) that the bill lie over, retaining its place on the calendar, the same was put and prevailed.

West Virginia Legislature

Senate Journal

Regular Session, 1933

Charleston, W. Va.,
Monday, March 6, 1933.

The Senate met at 2 o'clock P. M.

[fol. 189] The announcement of the vote on Senate amendment to

Eng. House Bill No. 112—"A Bill requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and the duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof,"

Came up in regular order as unfinished business.

Mr. Henderson moved that the bill, with the pending amendment and the unannounced vote be referred to the Committee on Efficiency and Economy.

Mr. Hodges moved to amend the motion by first announcing the vote on the pending amendment and then to refer the bill to the same committee, and,

On this question, demanded the yeas and nays.

The demand being sustained, they were ordered and taken as follows:

The yeas were:

Messrs. Beneke, Fleming, Garrett, Herold, Hodges, Hyre, Jones, Millender Mitchell, Myers, Paull, Smith and Taylor—13.

The nays were:

Messrs. Mathews (President), Abbot, Brown, Garwin, Helmick, Helsley, Henderson, Johnson, Neale, Null, Reynolds (of Mercer), Reynolds (of Mineral), Sandridge, White (of Hampshire), White (of Mingo) and Wiseman—16.

Absent and not voting: Mr. Weissenburger—1.

So, a majority of those present and voting not having voted in the affirmative, the motion did not prevail.

The question recurring on the motion of Mr. Henderson,

Mr. Herold moved to amend by adding "with instructions to report the same back not later than Wednesday, March 8, at 2 o'clock P. M."

[fol. 190] Subsequently, Mr. Herold, with the consent of the Senate, withdrew his amendment.

The question recurring on the motion of Mr. Henderson,

The same was put and prevailed, and the bill with pending amendment and unannounced vote, was referred to the Committee on Efficiency and Economy.

West Virginia Legislature

Senate Journal

Regular Session, 1933

Charleston, W. Va.,
Wednesday, March 8, 1933.

The Senate met at 2 o'clock P. M.

Mr. Fleming moved that

Eng. House Bill No. 112—"A Bill requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for violation thereof."

be withdrawn from the Committee on Efficiency and Economy and placed on the calendar in the position from which taken when referred.

On this motion, Mr. Fleming demanded the yeas and nays.

The demand being sustained, they were ordered and taken as follows:

The yeas were:

Messrs. Mathews (President), Abbot, Beneke, Brown, Fleming, Garrett, Garwin, Helmick, Helsley, Henderson, Herold, Hodges, Hyre, Johnson, Jones, Millender, Mitchell, [fol. 191] Myers, Neale, Null, Paull, Reynolds (of Mercer), Reynolds (of Mineral), Sandridge, Smith, Taylor, White (of Hampshire), White (of Mingo) and Wiseman—29.

The nays were: None.

Absent and not voting:

Mr. Weissenburger—1.

So, a majority of those present and voting, having voted in the affirmative, the motion prevailed.

On motion of Mr. Hodges, the vote on the pending amendment to the bill when referred was announced as follows:

The yeas were:

Messrs. Mathews (President), Abbot, Beneke, Helmick, Helsley, Henderson, Neale, Null, Reynolds (of Mercer), Reynolds (of Mineral, White (of Hampshire), White (of Mingo) and Wiseman—13.

The nays were:

Messrs. Brown, Fleming, Garrett, Herold, Hodges, Hyre, Johnson, Jones, Millender, Mitchell, Myers, Paull, Sandridge, Smith and Taylor—15.

Absent and not voting:

Messrs. Garvin and Weissenburger—2.

So, a majority of those present and voting, not having voted in the affirmative, the motion to amend did not prevail.

The bill was then ordered to third reading.

On motion of Mr. Herold the constitutional rule requiring the bill to be fully and distinctly read on three different days was dispensed with by a vote of four-fifths of the members present, taken by yeas and nays.

On dispensing with the constitutional rule,

The yeas were:

[fol. 192] Messrs. Mathews (President), Abbot, Beneke, Brown, Fleming, Garrett, Garvin, Helmick, Helsley, Henderson, Herold, Hodges, Hyre, Johnson, Jones, Millender, Mitchell, Myers, Neale, Null, Paull, Reynolds (of Mercer), Reynolds (of Mineral), Sandridge, Smith, Taylor, White (of Hampshire), White (of Mingo) and Wiseman—29.

The nays were: None.

Absent and not voting:

Mr. Weissenburger—1.

The bill was then read a third time and passed with its title.

On the passage of the bill, the years were:

Messrs. Mathews (President), Abbot, Beneke, Brown, Fleming, Garrett, Garvin, Helmick, Helsley, Henderson, Herold, Hodges, Hyre, Johnson, Jones, Millender, Mitchell, Myers, Neale, Null, Paull, Reynolds (of Mercer), Sandridge, Smith, Taylor, White (of Hampshire), White (of Mingo) and Wiseman—28.

The nays were:

Mr. Reynolds (of Mineral)—1.

Absent and not voting:

Mr. Weissenburger—1.

Mr. Myers moved that the bill take effect from passage.

On the question, "Shall the bill take effect from passage?"

The yeas were:

Messrs. Mathews (President), Abbot, Beneke, Brown, Fleming, Garrett, Garvin, Helmick, Helsley, Henderson, Herold, Hodges, Hyre, Johnson, Jones, Millender, Mitchell, Myers, Neale, Null, Paull, Reynolds (of Mercer), Sandridge, Smith, Taylor, White (of Mingo) and Wiseman—27.

The nays were:

[fol. 193] Mr. Reynolds (of Mineral)—1.

Absent and not voting:

Mr. Weissenburger—1.

Mr. White (of Hampshire) excused from voting.

So, two-thirds of all the members elected to the Senate having voted in the affirmative the President declared the bill (Eng. H. B. 112), takes effect from passage.

Ordered, That Mr. Myers communicate to the House of Delegates the action of the Senate.

[fol. 194] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FILING AMENDED AND SUPPLEMENTAL BILL, ETC.—Dec. 20, 1933

This 20th day of December, 1933, came the plaintiff, by H. D. Rummel, its attorney, and the defendant, by Homer A. Holt, his attorney, who joined together in tendering and asking leave to file a written stipulation entered into between the parties to the above-styled cause, wherein consent is given by the attorney for the defendant to the amendment of the bill of complaint, heretofore filed by the plaintiff herein, without notice to the defendant and without further answer by the defendant to the bill of complaint, as amended, and wherein consent is given by the attorney for the plaintiff to the amendment and supplement of the answer, heretofore filed by the defendant herein, without notice to the plaintiff, and the said parties also tendered and asked leave to file an amended bill of complaint embodying the amendment set forth in the said stipulation, and an amended and supplemental answer embodying the amended and supplemental allegations set forth in the said stipulation; and upon motion of the parties by their said attorneys, the said stipulation is ordered to be filed and made a part of the record, and the said amended bill of complaint and the said amended and supplemental answer are also ordered to be filed herein; all of which is ordered without prejudice to the temporary restraining order heretofore issued, or to any other proceddings heretofore had.

[fol. 195] It is further ordered that the answer, as amended, and motion to dismiss heretofore interposed shall stand as the answer and motion upon the said bill of complaint as amended.

Morris A. Soper, U. S. C. J.; Geo. W. McClintic, W. Calvin Chesnut, U. S. District Judges.

[fol. 196] IN UNITED STATES DISTRICT COURT

[Title omitted]

FIRST AMENDED BILL OF COMPLAINT—Filed December 20, 1933

To the Honorable George W. McClintic, Judge of said Court:

And now comes the plaintiff, and with consent of the defendant by stipulation duly entered into and filed herein, amends its original bill of complaint herein by striking therefrom the third aud fourth paragraphs from the end of section XI of said bill of complaint in their entirety, beginning with the words "Plaintiff avers that the volume of its business as a whole" at line 24, page 24, of the said original printed bill of complaint, and ending with the word "rights" at line 21, page 25, of said original printed bill of complaint, and by inserting in lieu thereof the following:

"Plaintiff avers that the volume of its business as a whole and at each of its service stations and leased outlets and vending privilege outlets has materially and successively decreased during the years 1931 and 1932, and such volume for the first six months of the year 1933 was substantially less than during the corresponding months of the year 1932; that the volume of its business for the first eight months of the year 1933 was likewise substantially less than during the corresponding months of the year 1932; that, under the application of said House Bill No. 112 by defendant Tax Commissioner, the average tax of approximately Two Hundred Forty Dollars imposed upon the plaintiff's bulk plants, service stations, and outlets substantially [fol. 197] equals the average net earnings per unit for all of plaintiff's service stations and outlets for the year 1932;

that 95 per cent of all the leased outlets and vending-privilege outlets handling the petroleum products of the plaintiff did not produce sufficient net earnings for the plaintiff during the year 1932 to pay the average tax thereon, had said House Bill No. 112 been effective during said year; that the imposition of said license tax upon the operation of said outlets, as the outlets of the plaintiff within the alleged meaning of said House Bill No. 112, in addition to all other taxes and license fees assessed and paid by the plaintiff, will inevitably and necessarily operate to destroy and confiscate the value to the plaintiff of said leases and agreements relating to said outlets, which otherwise constitute valuable and profitable rights of the plaintiff; that, if the application of said House Bill No. 112 be sustained as against the plaintiff, the inevitable operation of the schedule of rates contained in said Act, under any conditions reasonably to be anticipated, will be the taking of all profit of the plaintiff from the marketing of petroleum products through said service stations and outlets, the imposition of a heavy loss upon it amounting to a substantial confiscation of its capital and assets, and the arbitrary destruction of the value of its business and property interests in the State of West Virginia, whereas many competing operators of service stations and outlets possessing substantially the same physical characteristics and economic advantages as those of the plaintiff are required to pay only an insignificant average license tax per unit under the schedule of rates contained in said House Bill No. 112."

H. D. Rummel, Rummel, Blagg & Stone, Attorney for Plaintiff.

Dated December 20, 1933.

[fol. 198] In United States District Court

[Title omitted]

First Amended Answer—Filed December 20, 1933

To the Honorable George W. McClintic, Judge of said Court:

And now comes the defendant and, with consent of the plaintiff by stipulation duly entered into and filed herein,

amends his original answer herein by adding the following new section designated as "XI-A", which should be inserted after Section "XI" of the original answer herein, and his verification of said amendment, as follows:

"XI-A"

"The defendant says that the plaintiff corporation, Standard Oil Company of New Jersey, a Delaware corporation, is but a subsidiary company of the Standard Oil Company, a New Jersey corporation, and that the Standard Oil Company, a New Jersey corporation, owns all of the capital stock of the plaintiff; that the plaintiff, likewise, is the parent company of many, various and sundry other companies and is affiliated with many, various, and sundry other companies, and that the Standard Oil Company, a New Jersey corporation, the parent company of plaintiff, has direct connections with and is the parent company of, and is affiliated with many, various, and sundry other companies, the number of which in the aggregate, as the defendant is informed, believes, and, therefore, charges the fact to be, is not less than one hundred eighty corporations and companies, all of which are engaged in one or more activities related to the petroleum industry, includ- [fol. 199] ing the ownership and leasing of oil lands, the drilling for oil and gas, the production of petroleum and natural gas, the transportation of petroleum by pipe lines and other transportation means, the transportation of natural gas by pipe lines, the refining of petroleum, the extraction of gasoline from natural gas, the transportation and distribution of the refined products, as well as the transportation and distribution of by-products, at whole sale and at retail, the operation of tank cars, the manufacture and transportation and distribution of automobile accessories and supplies, including tires and tubes, batteries, and other miscellaneous articles, the rendering of services of various natures, including the servicing of motor vehicles, the manufacture, distribution and sale of carbon and various carbon products, the distribution of anti-freeze compounds, and other activities and industries too numerous to mention; that the business activities of the plaintiff and its parent, affiliate and subsidiary companies are conducted particularly throughout the United States, and are conducted on a wide scale in many foreign

countries as well, including South America, Mexico, Europe, Asia, Africa, and other countries; that the activities of the plaintiff and such other companies affiliated in the manner herein-above set forth are very extensive and, in fact, so extensive that the principal aim and purpose of the operation of said companies is the substantial control of the production and marketing of petroleum and natural gas and petroleum and natural gas products; that the refining and wholesale and retail distribution of petroleum and petroleum products is but an incident in the business of the plaintiff in the production and transportation of such petroleum and natural gas; that the various relations and inter-relations between the plaintiff and said other companies are extensive and complicated and such that the various expenses, charges, and costs may readily be so apportioned among the various companies as to direct and [fol. 200] credit, or charge to many of said companies the profits or losses of the various activities as willed and directed by said company to such an extent that the defendant is advised, believes, and, therefore, charges that the books and records of the plaintiff company, Standard Oil Company of New Jersey, a Delaware corporation, are not in fact and substance a true and accurate representation of the profits or losses of said particular company when said particular company is considered to be a mere instrumentality in the larger system dominated particularly by the immediate parent company of the plaintiff, that is to say, the Standard Oil Company, a New Jersey corporation.

"The defendant, therefore, in connection with any and all of the allegations of the plaintiff in its bill of complaint contained in any and all of its respective paragraphs, wherein it is alleged that the said tax is burdensome and confiscatory, calls upon the plaintiff for a strict showing, accounting, and proof of the business relations between the plaintiff, the Standard Oil Company, a New Jersey corporation, and all other parent, affiliate, or subsidiary companies, the character of business done by each, the proportionate amount of stock held in each by the other, the ownership of the remaining stock in each of the various companies, the gross revenues of each of said companies, the value of the properties held and owned by each of said companies and the nature thereof, the operating expenses

of each of said companies, the nature and purpose thereof, and the profit and loss of each of said companies and the sources from which obtained."

That Section XVII of the original answer herein, in its entirety, be stricken out, and that there be inserted in lieu thereof the following section, which shall be referred to hereinafter in this cause as "Section XVII-Amended":

"Section XVII-Amended"

"Defendant admits that unless he be enjoined and restrained from paying to the State Treasury the money so paid to him by the plaintiff, he will pay such moneys into [fol. 201] the State Treasury.

(a) The defendant neither admits nor denies the allegations in Section (a) of said paragraph for the reason that the assets of the defendant in his individual rights are not material in this cause. The defendant admits that his official bond is in the penalty of five thousand dollars, but the defendant denies that the only means by which the defendant, either in his personal or official capacity, may be enabled to respond to a proper claim of the plaintiff, if any there be, is the retention by the defendant of the tax moneys paid to him by the plaintiff as in the bill of complaint alleged.

(b) The defendant admits that he is required to pay into the State Treasury monthly all moneys received by him under the provisions of said Act and that prior to the institution of this suit he had declared his intention to pay said tax moneys so paid to him by the plaintiff into the State Treasury on the first day of July, 1933.

(c) The defendant denies that if and when he should pay said tax moneys into the State Treasury there is no proceeding provided by law for the recovery thereof by the plaintiff.

(d) The defendant denies that a judgment or decree in favor of the plaintiff in this or any other proceeding after payment of said moneys into the State Treasury would be unenforcible or uncollectible, but, to the contrary, avers

that upon a legal showing by the plaintiff of its right to recover such moneys, such right would be enforcible and collectible for the reasons hereinafter set forth.

(e) Defendant admits that the Act requires that after payment into the State Treasury said tax moneys shall constitute a part of the general fund for the elementary schools.

The defendant denies that for many months or for any time there has been any substantial deficit in said General School Fund of the State, and denies that there is now any such deficit, and denies that there will continue to be [fol. 202] any such deficits for any indefinite or any other period in the future, as will more fully be hereinafter set forth.

(f) Defendant denies that any appropriation by the legislature, beyond appropriations already made, is necessary for the recovery of said money by the plaintiff, if the plaintiff be entitled thereto, and denies that after the entry of judgment or decree for the recovery of said money by the plaintiff, if the plaintiff be entitled thereto, and after a suitable appropriation by the legislature if one should be necessary or should be made, there is no jurisdiction in the Courts of the State of West Virginia to compel the satisfaction of such judgment and the compliance with such appropriation by the State or any of its officers, agents, and employees; and, likewise, the defendant denies that there is no jurisdiction in the Courts of the United States to accomplish said purposes if proper grounds for the jurisdiction of the Courts of the United States can be shown.

(g) Defendant denies that if the plaintiff show itself entitled to recover such moneys the plaintiff would be required to await an appropriation by the legislature, but, for the reasons hereinafter set forth avers that said moneys would be forthcoming without awaiting the action of the legislature, and is, therefore, not advised whether the plaintiff would be entitled to receive interest while awaiting action of the legislature.

(h) Defendant denies that said Act is ambiguous and doubtful with respect to the remedy of the taxpayer to recover taxes paid under protest, but, to the contrary, avers that the general laws of the State of West Virginia, as hereinafter set forth, provide an appropriate remedy at law.

The defendant, however, admits that the said Act has not been interpreted by any Court of the State of West Virginia or of the United States.

And for further answer to said paragraph XVII of said bill the defendant says that Section 1, Article 3, Chapter [fol. 203] 12 of the Official Code of West Virginia is a valid, existing, and enforcible statute of the State of West Virginia, and is as follows:

"'Every person claiming to receive money from the treasury of the State shall apply to the auditor for a warrant for the same. The auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, and for so much thereof as he shall find to be justly due from the State, if payment thereof be authorized by law, and there be an appropriation not exhausted or expired out of which it is properly payable, he shall issue his warrant on the treasurer, specifying to whom and on what account the money mentioned therein is to be paid, and to what appropriation the same is to be charged. On the presentation of such warrant to the treasurer, he shall ascertain whether the same has been drawn in pursuance of an appropriation made by law, and if he find it to be so, he shall in that case, but not otherwise, indorse his check upon such warrant, directed to some depository, which check shall be payable to the order of the person who is to receive the money therein specified. If such check shall not be presented for payment within three years after it is drawn, it shall then be the duty of the treasurer to charge it again to the depository on which it was drawn, to credit the state fund with the amount, and immediately to notify the auditor to make corresponding entries on his books. No state depository shall pay a check unless it is presented within three years after it is draws, and the treasurer is hereby authorized to cover into the treasury, by appropriate entries, all checks that have been outstanding for three years or over. All claims required by law to be allowed by any court, and payable out of the state treasury, shall have the seal of the court allowing or authorizing the payment of the same affixed by the clerk of such court to his certificate of its allowance; and no such claim shall be audited and paid by [fol. 204] the auditor unless the seal of such court be thereto attached as aforesaid. No tax or fee shall be charged by

the clerk for affixing his seal to the certificate referred to in this section."

"The defendant says further that Sections 1, 2, 3, 4, and 5, Article 2, Chapter 14, of said Official Code of West Virginia are valid, existing and enforcible statutes of West Virginia, and are as follows:

" 'Sec. 1.—Any person having a pecuniary claim against the State, which the auditor has disallowed in whole or in part, may apply by petition to the circuit court of the county in which the seat of government is, to have such claim audited and adjusted.

" 'Sec. 2.—The person desiring to file such petition shall give the auditor at least ten days' previous notice of his intention to do so, and of the day he will present the same, and it shall be the duty of the auditor to appear at such court and file his answer to such petition, stating his objections to such claim and his reasons for rejecting the same or any part thereof. The case shall be heard without unnecessary delay upon the petition and answer, and the evidence, if any, produced by either party, and it shall be the duty of the attorney general, or, in case of his absence, the prosecuting attorney of the county, to appear and defend the interest of the State in the case. And if the claim be disallowed by the court, a fee of ten dollars to the attorney so appearing shall be taxed by the court against the petitioner in the bill of costs.

" 'Sec. 3.—The court shall ascertain and enter of record what sum, if any, is due to the petitioner upon the claim mentioned in the petition and shall certify its decision to the auditor whether the claim, or any part thereof, be allowed or not; and, if such claim or any part of it be allowed, the auditor shall report the same to the legislature at its next session. But no such claim shall be paid until an appropriation shall be made therefor by the legislature. [fol. 205] " 'Sec. 4.—All suits in which it may be necessary and proper to make any of the following public officers a party defendant as representing the State, to-wit: The governor, attorney general, treasurer or auditor; or in which it may be necessary or proper to make any of the following corporations parties defendants, to-wit: the board of public works or any other public corporation composed of officers of government, of the funds and prop-

erty of which the State is sole owner; and all suits in which it shall be attempted to enjoin or otherwise suspend or affect any judgment or decree on behalf of the State, obtained in the circuit court of the county in which the seat of government is, or elsewhere, or any execution issued on such judgment or decree, shall be brought and prosecuted in the circuit court in which the seat of government is.

" 'Sec. 5.—No such petition as is mentioned in section one of this article shall be presented or filed, and no such suit as is mentioned in the next preceding section shall be brought after five years from the time the claim of the petitioner or plaintiff might have been presented or asserted. If, however, the person having such claim was an infant, married woman, insane or imprisoned at the time the same might have been presented, or asserted, such petition may be presented and such suit may be brought within two years after the removal of such disability.'

"And the defendant says that Section 30-C, Chapter 1, Acts of the West Virginia Legislature, First Extraordinary Session, 1933, passed June 3, 1933, effective from passage, appropriated the sum of five million, five hundred thousand dollars to supplement the General School Fund for the fiscal year beginning July 1, 1933, and appropriated a like sum to supplement the General School Fund for the fiscal year beginning July 1, 1934, and is as follows:

	1934	1935
" 'Sec. 30-C. To supplement the General School Fund to meet the requirement of law relating to [fol. 206] state aid or maintenance of local schools. For the purpose of paying four months teachers' salaries and for equalization fund purposes	5,500,000.00	5,500,000.00

The above appropriation to be transferred to the General School Fund on the requisition of the Governor at such times and in such amounts as the receipts of the State Fund—General Revenue will, in the opinion of the Governor, permit.'

And the defendant says that a large part of said appropriation for the fiscal year beginning July 1, 1933, and

all of said appropriation for the fiscal year beginning July 1, 1934, remains unexpended, and each of said sums is largely in excess of all taxes which will be collected and received under the provisions of said House Bill No. 112; and the defendant says a portion of Section 7 of said Chapter 1 of the Acts of the Legislature of West Virginia, First Extraordinary session, 1933, is as follows:

"' • • •

"'For refunding moneys erroneously paid into the treasury such sums are hereby appropriated as may be erroneously so paid, payable out of the same fund into which paid.

"' • • • .'

"Defendant says that Section 111 of Sub-Section 'L' of said Chapter 1 of the Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, is as follows:

[fol. 207] "'Sec. 111. For refunding overpayments made into the treasury on account of taxes, licenses, fines and commissions, to be paid out of the fund into which they were paid, such an amount as may be necessary for such purpose is hereby appropriated.'

"And the defendant says that each of the afore-mentioned statutes of West Virginia is a valid and enforcible statute and a part of the laws of the State of West Virginia.

"The defendant says further that there are no outstanding unpaid warrants of the State of West Virginia drawn against any fund, and particularly against the General School Fund; that it is true that the financial situation of the counties, districts and municipalities of the State of West Virginia is at present somewhat unsettled on account of important changes in the tax laws of the State of West Virginia, but that, thus far, the State of West Virginia, as such, has been able to meet and has met all valid claims and demands against it promptly and when due, and the defendant says that from his own knowledge and from reliable information he believes that the State of West Virginia is now, and will continue to be, able to promptly meet any and all valid claims and demands which may for any cause arise against it, and especially does the plaintiff aver that the State of

West Virginia is ready, willing, and able in all respects to make return of any taxes paid to it under the provisions of said House Bill No. 112 upon a proper showing that the person, firm, or corporation paying the same is entitled to a recovery thereof.

"The defendant says further that he is advised, believes, and, therefore, charges that the State of West Virginia enjoys throughout all financial circles the very highest financial rating and credit.

"And now having fully answered the plaintiff's bill, this defendant further answering, says that the plaintiff is [fols.208 & 209] not entitled to any relief prayed for in its said bill, for the reason that said House Bill No. 112 under the provisions of which the plaintiff paid the money involved in this cause to the defendant as State Tax Commissioner of West Virginia, is constitutional and lawful in every respect, and that the relief prayed for by the plaintiff in said bill is predicated upon no other ground that the alleged unconstitutionality of said Act.

"And now, having fully answered the plaintiff's bill of complaint, this defendant prays that the injunctive and any and all other relief prayed for in said bill be denied the plaintiff, and that he may be hence dismissed with his reasonable costs in this behalf expended; and as in duty bound he will ever pray, etc."

Fred L. Fox, In His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia, by Counsel: Homer A. Holt, Attorney General.

Duly sworn to by Fred L. Fox. Jurat omitted in printing.

[fol. 210] In United States District Court

[Title omitted]

Order of Submission—Dec. 20, 1933

This 20th day of December, 1933, this cause came on to be heard before the Honorable George W. McClintic, Judge of this Court, the Honorable Morris A. Soper, Judge of the Circuit Court of Appeals for the Fourth Circuit, and

the Honorable W. Calvin Chesnut, Judge of the District Court of the United States for the District of Maryland, duly convened pursuant to statute for the hearing of this cause; upon the duly verified bill of complaint and exhibits heretofore filed herein; upon process duly served upon the defendant; upon the motion of said defendant to dismiss said bill of complaint and the answer of the defendant to said bill and general replication to said answer; upon the temporary restraining order heretofore awarded herein; upon the application of the plaintiff for an interlocutory injunction against the defendant herein as prayed for in the bill of complaint; upon the notice of hearing on the application for interlocutory injunction herein, duly served upon the defendant and upon the Honorable H. G. Kump, Governor of the State of West Virginia and the Honorable H. A. Holt, Attorney General of the State of West Virginia, and now filed herein, as provided by law; which hearing was heretofore set for the 11th day of September, 1933, and by agreement of counsel and order of the Court was duly continued until this date; upon the amended supplemental bill of complaint heretofore filed herein by the plaintiff and the amended and supplemental [fol. 211] answer of the defendant likewise filed herein, and the written stipulation of the parties consenting to the filing of said supplemental pleadings; upon the printed stipulation of facts entered into between the plaintiff and the defendant herein in lieu of the formal taking of evidence, with exhibits accompanying the same, which stipulation is duly signed by counsel for the respective parties, and is now ordered to be filed herein; and upon all the former pleadings, evidence and stipulations filed, and upon all the former proceedings had herein, and the cause was argued by counsel.

Whereupon, it is ordered that this cause be submitted upon all the matters above recited, and the Court takes time to consider thereof.

Geo. W. McClintic, Judge, District Court of the United States for the Southern District of West Virginia. Morris A. Soper, Judge of the United States Circuit Court of Appeals for the Fourth Circuit. W. Calvin Chesnut, Judge of the District Court of the United States for the District of Maryland.

[fol. 212] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING ON APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed December 20, 1933

To the Honorable H. G. Kump, Governor of the State of West Virginia; to the Honorable H. A. Holt, Attorney General of the State of West Virginia, and to the Honorable Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia:

You, and each of you, are hereby given notice, pursuant to the provisions of Section 266 of the Judicial Code, as amended (U. S. Code, Title 28, Section 380), that the District Court of the United States for the Southern District of West Virginia, has set for hearing and determination in the federal court room in the Federal Building, in the city of Charleston, state of West Virginia, on the 11th day of September, 1933, at ten o'clock in the forenoon of said day, the application for an interlocutory injunction in the above-entitled cause, to enjoin the enforcement, operation and execution of an Act of the Legislature of the State of West Virginia, known as House Bill No. 112, passed at a regular session thereof on March 8, 1933, effective from passage, entitled "An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in [fol. 213] connection therewith, and prescribing penalties for the violation thereof", by restraining the acts of said Fred L. Fox, Tax Commissioner of said state, in the enforcement and execution of said House Bill No. 112, and more particularly restraining the payment over into the State Treasury, pursuant to Section 10 of said House Bill No. 112, the sum of Two Hundred Forty Thousand One Hundred Seventy-three Dollars and Fifty Cents ($240,-173.50) heretofore paid to the said Tax Commissioner by the plaintiff in the above cause under written protest and duress, said sum, constituting the license tax required by said Tax Commissioner to be paid by said plaintiff under

color of the provisions of said statute, now being held intact by said Tax Commissioner as a separate and segregated fund, or from enforcing any of the other provisions of said statute against the plaintiff, on the ground that said statute violates the Constitution of the United States in that it deprives the plaintiff of its property without due process of law and denies to it the equal protection of the laws contrary to Section One of the Fourteenth Amendment thereof.

There is served upon each of you herewith copies of the verified bill of complaint in said cause, the application for interlocutory injunction, and the order of the District Court of the United States for the Southern District of West Virginia, dated June 30, 1933, granting a temporary restraining order and convoking a statutory district court of three judges for the hearing of said application for an interlocutory injunction, as provided for by said Section 266 of the Judicial Code.

Dated July 7th, 1933.

H. D. Rummel, D. O. Blagg, A. G. Stone, Solicitors for Plaintiff.

[fols. 214-220] Legal service of the within notice accepted this 14th day of July, 1933.

H. G. Kump, Governor of the State of West Virginia.

Legal service of the within notice accepted this 14th day of July, 1933.

Homer A. Holt, Attorney General of the State of West Virginia.

Legal service of the within notice accepted this 14th day of July, 1933.

Fred L. Fox, In His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia.

[fol. 221] In United States District Court for the Southern District of West Virginia

In Equity. No. 3312

Standard Oil Company of New Jersey, a Corporation,

vs.

Fred L. Fox, in His Individual Right and as Tax Commissioner of the State of West Virginia

Stipulation of Facts Entered Into Between the Plaintiff and the Defendant Herein, in Lieu of the Formal Taking of Evidence.—Filed Dec. 20, 1933.

It is stipulated and agreed by and between the parties that for all purposes of this suit the following statements shall be taken, treated; read, and considered as evidence, the same, and with the same effect, as though presented by evidence adduced in the regular way, that is to say:

It is agreed between the parties to this suit that the allegations contained in paragraphs I, II, V, VI and VII of plaintiff's bill of complaint shall be taken, treated and considered as true.

[fol. 222] The following exhibits filed with the bill of complaint are true copies of the papers, records, and documents, respectively, referred to in the several paragraphs of said bill:

Exhibit A. Act of the Legislature of West Virginia, House Bill No. 112, chain store tax law. Page 51 of the printed bill.

Exhibit B. Application blank for license under chain store tax law, and regulations of state tax commissioner. Page 56 of the printed bill.

Exhibit C. Interpretation of House Bill No. 112, chain store tax law, by state tax commissioner. Page 59 of the printed bill.

Exhibit D. Letter of protest by plaintiff, dated June 6, 1933, signed by J. C. King, Manager, with application for license, and list of bulk plants, company-operated service stations, and exclusive contract and vending privilege outlets. Page 61 of the printed bill.

The meaning, construction, and interpretation of the terms "stores" and "mercantile establishments", when and

wherever used and referred to in this stipulation, in House Bill No. 112, passed by the Legislature of West Virginia on March 8, 1933, and in the pleadings and proof in this suit, are not agreed upon by counsel. The term "petroleum products", as used in connection with the products distributed by the plaintiff, means all products and derivatives of petroleum oil used in the fueling and lubrication of motor vehicles and other machinery, including kerosene, gasoline, motor oils, greases, and the like.

[fol. 223] Exhibits E, F, G and H, filed with plaintiff's bill of complaint (pages 97-111 of printed bill), are true copies of the agreements and contracts under which its leased outlets and vending privilege outlets were operated as of the effective date of said House Bill No. 112, as alleged in paragraph X of said bill.

Exhibit I, filed with plaintiff's bill of complaint, and appearing at pages 112-114 of the printed bill, is a true copy of Secs. 2 and 3, Article 14, Chapter 11, Code of West Virginia, providing an annual license tax of five dollars upon every distributor of gasoline for resale, and one dollar upon every retail dealer, and an excise tax of four cents per gallon upon all gasoline sold by distributors and retailers, and said sections were in effect as of the effective date of said House Bill No. 112 and at the present time.

Exhibit A, filed with the answer of defendant, and appearing at pages 41-57 of the printed answer, is a true copy of Article 14, Chapter 11, Code of West Virginia, in effect on March 8, 1933, and to the present time relating to license and excise taxes imposed upon the sale of gasoline.

Exhibit B, filed with the answer of defendant, and appearing at pages 58-64 of the printed answer, is a true copy of the record of the proceedings of the Senate of West Virginia therein purported to be set out, with respect to House Bill No. 112, as shown by the Journal of that body.

It is agreed that the plaintiff, Standard Oil Company of New Jersey, is a corporation created under the laws of the State of Delaware, and a citizen and resident of said State, [fol. 224] and that the defendant, Fred L. Fox, in his individual capacity, is a citizen and resident of the State of West Virginia, and a resident of the Southern District thereof, and that the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000).

Taxpayers Operating Five or More Stores Exclusive of Gasoline Filling Stations

It is agreed that the following is substantially a correct list of the persons, firms, and corporations owning or operating five or more stores each in the State of West Virginia, as of the effective date of House Bill No. 112 (excluding dealers in gasoline and petroleum products):

[fol. 225]

Name		Address	Chain store tax
Lillybrook Coal Co	5 Stores	Beckley, W. Va	24.50
Boone County Coal Co	" "	Sharples, W. Va	24.50
Winding Gulf Collieries	" "	Bluefield, W. Va	24.50
Hatfield, Campbell Creek Coal Co.	" "	Cincinnati, Ohio	24.50
Kingston-Pocahontas Coal Co	" "	New York, N. Y	24.50
Pond Creek Pocahontas Stores	" "	Bartley, W. Va	24.50
W. T. Grant Co	" "	New York, N. Y	24.50
McKelvey Stores Co	" "	Charleston, W. Va	24.50
Moskins Stores	" "	New York, N. Y	24.50
A. & L. Stores	" "	Clarksburg, W. Va	24.50
Ammar Brothers	" "	Williamson, W. Va	24.50
McClung & Morgan	" "	S. Charleston, W. Va.	24.50
Margolis Brothers	" "	Montgomery, W. Va.	24.50
Grafton Feed & Storage Co	" "	Grafton, W. Va	24.50
National Supply Co	" "	Pittsburgh, Pa	24.50
Keystone Shoes Stores	" "	Pittsburgh, Pa	24.50
Swift & Company	" "	Chicago, Ill	24.50
McKesson-Htg. Drug Co	" "	Huntington, W. Va	24.50
Lewis Furniture Co	" "	Huntington, W. Va	24.50
Hutchison Coal Co	6 stores	Fairmont, W. Va	35.00
Cabin Creek Consolidated Coal Co.	" "	Kayford, W. Va	35.00
Carbon Fuel Co	" "	Charleston, W. Va	35.00
McGinnis Co	" "	Huntington, W. Va	35.00
Jas. M. Hackley	" "	Keyser, W. Va	35.00
Logan Piggly Wiggly	" "	Logan, W. Va	35.00
D. D. Fitzgerald	" "	Richmond, Va	35.00
Spillman Brothers	" "	Martinsburg, W. Va.	35.00
Valley Camp Stores	" "	Wheeling, W. Va	35.00
Bowser Lumber & Feed Co	" "	Sistersville, W. Va	35.00
Hoge Davis Drug Co	" "	Wheeling, W. Va	35.00
Thompson Drug Co	" "	Ravenswood, W. Va.	35.00
John P. Garrow	" "	Clarksburg, W. Va	35.00
Hubbard Grocery Co	" "	Charleston, W. Va	35.00
Wm. Ritter Lumber Co	7 stores	Columbus, Ohio	45.50
The Welch Milk Co	" "	Welch, W. Va	45.50
United Woolen Co	" "	Columbus, Ohio	45.50
Bluefield Piggly Wiggly Co	" "	Bluefield, W. Va	45.50
Montgomery Ward & Co	" "	Chicago, Ill	45.50
Haverfield Co	" "	Columbus, Ohio	45.50
G. R. Kinney Co	" "	New York, N. Y	45.50
J. C. Penney Co	8 stores	New York, N. Y	56.00
Virginia Supply Co	" "	Roanoke, Va	56.00
Clark Hardware Co	" "	Bluefield, W. Va	56.00
Dunlap Tire & Rubber Co	" "	Buffalo, N. Y	56.00
Firestone Service Stores	" "	Fairmont, W. Va	56.00

[fol. 226]

Name		Address	Amount of tax
C. J. Casdorph & Son	9 stores	Ronceverte, W. Va.	66.50
Buxton & Landstreet	" "	Baltimore, Md.	66.50
The Gas & Electric Appliance Co	" "	Pittsburgh, Pa.	66.50
A. W. Cox Department Store	10 stores	Charleston, W. Va.	77.00
Hampton Brothers	" "	Huntington, W. Va.	77.00
United Supply Company	" "	Pittsburgh, Pa.	77.00
Singer Sewing Machine Co	" "	New York, N. Y.	77.00
P. H. Butler Co	11 stores	Pittsburgh, Pa.	97.50
Junior Mercantile Co	" "	Omar, W. Va.	97.50
Standard Supply Co	" "	Clarksburg, W. Va.	97.50
Appalachian Electric Power Co	" "	Roanoke, Va.	97.50
Pocahontas Fuel Co	12 stores	Pocahontas, Va.	118.00
Island Creek Coal Co	" "	Holden, W. Va.	118.00
S. S. Kresge Co	" "	Detroit, Mich.	118.00
General Stores, Inc	" "	Columbus, Ohio	118.00
Armour Co	" "	Chicago, Ill.	118.00
New River & Pocahontas Coal Co	13 stores	Philadelphia, Pa.	138.50
J. G. McCrory Co	" "	Parkersburg, W. Va.	138.50
Coffman-Fisher Co	" "	Davis, W. Va.	138.50
W. Va. Farm Bureau Coop. Assn.	" "	Clarksburg, W. Va.	138.50
The Union News Co	" "	New York, N. Y.	138.50
The New River Co	" "	Macdonald, W. Va.	138.50
Consolidation Coal Co	15 stores	New York, N. Y.	179.50
F. W. Woolworth Co	21 stores	New York, N. Y.	367.50
G. D. Murphy Co	" "	McKeesport, Pa.	367.50
State Grocery Co	22 stores	Moundsville, W. Va.	403.00
Koppers Stores, Inc	25 stores	Pittsburgh, Pa.	509.50
Monongahela West Penn	27 stores	Fairmont, W. Va.	563.00a
Kroger Grocery & Baking Co	94 stores	Cincinnati, Ohio	12,469.00
Atlantic & Pacific Tea Co	198 stores	Pittsburgh, Pa.	38,521.00
Total			$57,252.50

[fol. 227] Operators of More Than One Filling Station

The following is a substantially correct list of the dealers in gasoline and petroleum products in the State of West Virginia, as of the effective date of said House Bill No. 112, owning or operating more than one service station or other place of business, and who have made application for license under said Act and/or paid the taxes provided for therein:

[fol. 228]

Name	Address	No. stations	Chain store tax
Ashland Refining Company.	Ashland, Ky.....	95	$12,719.50
Atlantic Refining Company	Philadelphia, Pa.....	5	24.50
Arrowhead Gasoline Company.....	Moundsville, W. Va...	2	8.00
Aracoma Oil & Gas Co., Inc.	Logan, W. Va.....	2	8.00
American Oil Company....	Baltimore, Md.....	27	580.50
Benoline Co. of W. Va.....	Parkersburg, W. Va...	2	8.00
Brown's Garage.....	Belva, W. Va.....	2	8.00
Bell Oil Products Company	Beckley, W. Va.....	40	1,692.00
Belcher, Walter T.....	Anawalt, W. Va.....	2	8.00
Bush Chevrolet Company..	Glenville, W. Va.....	2	8.00
Bean, M. A.....	Moorefield, W. Va....	2	8.00
Bowers Supply Company...	Weirton, W. Va.....	2	8.00
Blevins, Chester L.....	Herndon, W. Va.....	2	8.00
Bryan Mays & Bro.....	Kenna, W. Va.....	3	13.50
Crew, Levick Company....	Philadelphia, Pa.....	4	19.00
Crago, Wm. J.....	Weirton, W. Va.....	3	13.50
Clarksburg Tire Co.....	Clarksburg, W. Va...	2	8.00
Dinsmoor & Company.....	St. Marys, W. Va....	4	19.00
Dor Company, The.....	Welch, W. Va.....	2	8.00
Evans, E. S.....	Kingwood, W. Va....	2	8.00
Ethel Service Station, Inc..	Ethel, W. Va.....	2	8.00
Elk Refining Company....	Charleston, W. Va....	22	403.00
Freedom Oil Works Co....	Freedom, Pa.....	3	13.50
Fluharty, W. H.....	New Martinsville, W. Va.....	2	8.00
Federal Oil Company.....	Akron, Ohio.....	2	8.00
Garrett & Moseley.....	Mount Hope, W. Va..	2	8.00
Galigher Motor Sales Co...	Huntington, W. Va...	2	8.00
Gulf Refining Company....	Pittsburgh, Pa.....	779	184,061.50
Haner, Noah B.....	Huntington, W. Va...	2	8.00
Harper Gas & Oil Company	Elkins, W. Va.....	2	8.00
Hope Natural Gas Company	Pittsburgh, Pa.....	4	19.00
Hellems, B. J.....	Madam Creek, W. Va.	2	8.00
Henaghan & Hanlon.....	Sistersville, W. Va....	4	19,00
Kanawha Gasoline Co.....	Charleston, W. Va....	2	8.00
Kessler's.....	Oak Hill, W. Va.....	2	8.00
Keystone Mfg. Company..	Erwin, W. Va.....	2	8.00
Luck, Paris F.....	Spanishburg, W. Va..	2	8.00
McCormick, David P.....	Arnoldsburg, W. Va..	2	8.00
Maynard's Service Station.	Williamson, W. Va...	4	19.00
Mid-Atlantic Supply Co...	Grafton, W. Va.....	3	13.50
Melrose Oil & Gas Co.....	Sistersville, W. Va....	2	8.00
National Refining Co., The.	Cleveland, Ohio.....	4	19.00
New York Petroleum Company.....	Parkersburg, W. Va...	3	13.50
Oak Hill Feed Mill.....	Oak Hill, W. Va.....	3	13.50
Pierson, Walter W.....	Dorfee, W. Va.....	2	8.00
Pure Oil Company.....	Chicago, Ill.....	151	26,747.50
Rhodes, Dayton.....	Spencer, W. Va.....	2	8.00
Reno Oil Company.....	Sistersville, W. Va....	4	19.00
Sterling Oil Company.....	St. Marys, W. Va....	20	332.00
Shanks Oil Company.....	Huntington, W. Va...	2	8.00
Sistersville Refining Company.....	Sistersville, W. Va....	2	8.00
Sprigg, M. B.....	Weston, W. Va.....	3	13.50
Shell Eastern Petroleum Products.....	New York, N. Y.....	3	13.50
Sinclair Refining Company.	New York, N. Y.....	94	12,469.00
Spears Bros., Inc.....	Wheeling, W. Va.....	9	66.50
Shaffer, Byron.....	Nestorville, W. Va....	2	8.00
Sprigg Lumber Company..	Weston, W. Va.....	2	8.00

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Name	Address	No. stations	Amount of tax
Spurr Distributing Company	Nashville, Tenn	3	13.50
Spears & Riddle Company	Wheeling, W. Va	3	13.50
Southern Oil Company	Pittsburgh, Pa	2	8.00
South Penn Oil Company	Pittsburgh, Pa	31	787.50
Standard Oil Company	Charleston, W. Va	1003	240,173.50
Tyler, William D	Talcott, W. Va	2	8.00
Twin City Oil & Gas Corp	Winchester, Va	3	13.50
The Texas Company	Norfolk, Va	9	66.50
Tabler, D. H	Kearneysville, W. Va	3	13.50
Tyler Oil Company	Sistersville, W. Va	3	13.50
Viking Distributing Company	Charleston, W. Va	23	421.00
W. J. Z. Oil Company	Grafton, W. Va	3	13.50
Waddell Bros	Phillipi, W. Va	2	8.00
Weston Oil Corp	Weston, W. Va	3	13.50
Wide Wake Filling Station	Bramwell, W. Va	2	8.00
Total		2453	$481,168.00

[fol. 230] Applicants for License Classified

The following recapitulation shows the number of taxpayers who have made application for license under said House Bill No. 112, classified according to the number of "stores" operated by them, respectively:

No. of store	No. of taxpayers	Total No. of stores
1	10,722	10,722
2	414	828
3	83	249
4	40	160
5	20	100
6	14	84
7	7	49
8	5	40
9	5	45
10	4	40
11	4	44
12	4	48
13	7	91
15	1	15
20	1	20
21	2	42
22	2	44
23	1	23
25	1	25

No. of store	No. of taxpayers	No. of of stores
27	1	27
29	1	29
31	1	31
40	1	40
94	2	188
95	1	95
151	1	151
198	1	198
779	1	779
1003	1	1003
	11,348	15,210

[fol. 231] Said taxpayers are further classified in the following statement, which also shows the total taxes payable under the provisions of said Act:

Persons Operating	Number of "stores"	Tax payable
Single stores	8,722	$21,722.22
Retail stores, two or more each	1,889	60,785.34
Wholesale stores, two or more each	146	1,017.50
Gasoline stations, single station	2,000	5,000.00
Gasoline stations, two or more each	2,453	481,168.00
Total	15,210	$569,693.06

Percentage of total paid by gasoline dealers 85.3%

The annual gross sales of the above described stores and stations situate in West Virginia, for the calendar year 1932, were approximately as follows:

	Number	Gross sales
Single stores	8,722	$218,776,948.94
Retail stores, two or more	1,889	75,454,257.38
Wholesale, two or more each	146	13,974,316.02
Gasoline stations, single (estimated)	2,000	5,158,000.00
Gasoline stations, two or more	2,453	15,198,638.94
	15,210	$328,562,161.28

Percentage of total sales made by gasoline dealers. 6.2%

[fol. 232] Stipulations as to Allegations of Bill of Complaint

Stipulation as to Paragraph VIII of Bill of Complaint

It is agreed that the plaintiff is authorized to transact the business of refining, transporting and distributing petroleum products in seven states, including the State of West Virginia and the District of Columbia. To this end, the plaintiff maintains and operates its principal refineries at Bayway, Bayonne and Jersey City, New Jersey, Baltimore, Maryland, Charleston, South Carolina, and Parkersburg West Virginia, and five hundred and thirty-eight bulk plants, located as follows:

Baltimore Branch	46
Washington Branch	25
Charleston, W. Va. Branch	43
Virginia Branch	108
North Carolina Branch	154
South Carolina Branch	105
Newark Branch	58

The business of the plaintiff is carried on through a branch office in each of said branch territories, and the territorial boundaries of the operations carried on at such branch offices correspond approximately to the boundaries of the states in which the same are respectively located. The business in the State of Delaware is managed from the Baltimore office. The branch office at Charleston, Knawha County, West Virginia, is one of such offices maintained by the plaintiff. The plaintiff was incorporated under the laws of the State of Delaware on August 29, 1927, and thereupon acquired certain of the business, property, rights, and good will of the Standard Oil Company, a cor-[fol. 233] poration of the State of New Jersey, and especially all of its property and business situate in the State of West Virginia. The Standard Oil Company, a corporation of the State of New Jersey, and the plaintiff have successively engaged in the business of refining, transporting, and distributing petroleum products in West Virginia for more than forty years. All the stock of the plaintiff is owned by said Standard Oil Company (a New Jersey corporation).

The principal office of the plaintiff is located in New York City. The president and most of the executive officers,

including the board of directors and legal staff, have their offices and perform their regular duties in said city. The general business policies and methods are determined at said principal office, and from there appropriate orders and directions as to the general conduct of the business of the plaintiff are forwarded to the various branches. In recent years, the major business of the plaintiff has been the refining and distributing of fuels and lubricants for the various types of motor vehicles, although substantial quantities of peroleum products are supplied for commercial and industrial use.

Stipulation as to Paragraph IX of the Bill of Complaint

It is agreed that since 1892 a large part of the petroleum products distributed by the plaintiff in the State of West Virginia has been refined at the Parkersburg refinery, and that in the year 1932 sixty-four per cent of the petroleum products so distributed by plaintiff in the state were refined or manufactured at said plant. The plaintiff refined substantially all the petroleum products sold by it.
[fol. 234] The details of said production and sales are shown in the following table:

Total gallons petroleum products distributed in West Virginia for year 1932		61,040,424.6
Total gallons petroleum products delivered into West Virginia from Parkersburg refinery in said year:		
Naptha & gasoline	32,413,810	
Refined oil	1,682,446	
Lubricating oil	633,015	
Fuel & gas oil	3,195,493	
Asphalt	1,493,479	
Grease	.....	
Wax (395,710 lbs.)	52,761	
		39,471,004.
Approximate percentage, petroleum products distributed in West Virginia in 1932 which were refined or manufactured at Parkersburg refinery		64%

It is agreed that at the service stations owned and operated by the plaintiff, it has offered for sale, during the past three years, certain products including automobile

tires, batteries, spark plugs, windshield wiper blades, and a limited variety of other automobile accessories and supplies. The defendant does not agree that the plaintiff's business in such products is limited or incidental, nor that the purpose or motive of the plaintiff in offering them for sale is to render more adequate service to the traveling public at said stations as stated in the bill of complaint (p. 10). It is agreed that the following table correctly shows [fol. 235] the volume of petroleum products sold in said stations owned and operated by the plaintiff for the years 1930, 1931, 1932, and the first eight months of 1933, as well as the price received for such products, and also the gross revenue from the sale of all other products and from the services rendered in said stations, and the percentage relationship of the revenue from such other products to such total revenues:

Year	Number stations	Gallons	Price*	Other products	Services	Percentage
1930....	105	13,249,644	$3,236,133	$88,402	$61,172	2.6%
1931....	96	14,092,136	2,940,191	243,060	81,503	7.4
1932....	98	11,257,881	2,403,304	166,495	58,816	6.3
1933 (8 mo.)..	94	6,871,318	1,278,515	98,176	34,287	6.9

The gross revenue of said stations from the sales of all products other than petroleum products, as shown above for the year 1932, amounted to approximately $1,699.00 per station, while the sales of petroleum products amounted to approximately $24,524 per station. The gross revenue from said sales other than the sale of petroleum products, for the period of three and two-thirds years above shown, amounted to 5.6% of the total revenues of said company-owned stations.

It is agreed that under the agency contracts, at the leased outlets and vending privilege outlets, the so-called "agents" act as the "agents" of the plaintiff in the handling of petroleum products. Other products may be handled by said "agents" and obtained either from the plaintiff or from others. If obtained from the plaintiff, they are acquired under the contracts hereafter exhibited with the stipulation as Exhibits No. 2-j, 2-k and 2-l. When obtained [fol. 236] from the plaintiff, such products are acquired either for cash or on such credit terms as the plaintiff may extend.

*Includes state and federal gallonage tax.

It is agreed that the plaintiff manages and supervises all of the business carried on within forty-five counties of the state from its West Virginia Branch Office located in Charleston, Kanawha County. The business conducted by plaintiff in ten counties of the state is managed and supervised in like manner from the branch office of the plaintiff located in Baltimore, Maryland. A small part of the business carried on in the extreme southern portion of the state is managed and supervised from the Virginia Branch Office of the plaintiff, located in the City of Richmond. The records and books of account relating to the business of each said branch office are kept and maintained at the respective branch offices.

It is agreed that the classified statement of volume of business done in West Virginia and the gross revenue therefrom for the years 1930, 1931, and 1932, appearing at page 12 of the bill of complaint, correctly shows the volume of business and gross revenue of the plaintiff from all sources and to all purchasers in West Virginia for said years, including sales from company-owned service stations, leased outlets, vending privilege outlets, bulk plants, the Parkersburg refinery, and from refineries outside the state to purchasers therein.

The corresponding figures for the first eight months of the year 1933 are as follows:

[fol. 237]

	Gallons	Gross Revenue
1. Petroleum Products:		
a. Motor fuels and kerosene	31,719,090.5	4,558,099.61
b. Lubricating oils and greases	2,294,196	851,084.28
c. Fuel and gas oil	180,116.5	10,332.03
d. Asphalt	769,074.3	34,527.98
Total petroleum products	34,962,477.3	5,454,043.90
2. Tires and tubes		210,433.95
3. Batteries		8,727.51
4. Automobile services		34,346.11
5. Miscellaneous products and accessories		29,535.58
		283,043.15
Total gross revenue		$5,737,087.05

Stipulation as to Paragraph X of the Bill of Complaint

It is agreed that the products of the plaintiff are distributed to the consuming public from the five classes of outlets described in paragraph X of the bill of complaint, to-wit:

(1) Service or filling stations, owned or leased by the plaintiff, and operated by it.
(2) Bulk distributing plants.
(3) Leased outlets.
(4) Vending privilege outlets.
(5) Stations of individual dealers.

[fol. 238] It is agreed that the company-owned or operated stations and bulk plants are owned, operated, maintained and/or controlled by the plaintiff. As to the ownership, operation, maintenance and/or control of the leased outlets and vending privilege outlets, no stipulation is made further than the facts elsewhere, appearing herein. It is agreed that the individual dealer outlets are not owned, operated, maintained and/or controlled by the plaintiff within the meaning of said Act.

It is agreed that beginning with the year 1922 the State of West Virginia entered upon an extensive program of highway construction, and the use of motor vehcles for transportation of persons and freight and the need and growth of numerous filling and service stations increased rapidly from that date. The number of filling or service stations owned and operated by the plaintiff for the period from 1922 to 1932, inclusive, and in operation at the date of the filing of the application for license, is as follows:

December 31, 1922	6
1923	11
1924	18
1925	31
1926	48
1927	65
1928	73
1929	93
1930	105
1931	96
1932	98
March 8, 1933	101

The above numbers do not include the agency stations.

[fol. 239] It is agreed that the gross revenues, net earnings, and percentages of profit derived from the service stations owned and operated by the plaintiff for the years 1930, 1931, 1932, and the first eight months of 1933, as shown by the books of the plaintiff, are as follows:

Year	Gross revenue	Net earnings	Per cent net profit to sales	Per cent net profit to investment
1930	$3,385,713	$315,103	9.31	14.67
1931	3,264,749	349,560	10.70	13.27
1932	2,628,615	174,712	6.65	6.49
*1933 (8 Mo.)	1,410,976	821*	.06*	.03*

The net earnings from the above stations for the years indicated have averaged, per station, as follows:

1930	$3,000.98	
1931	3,641.25	
1932	1,782.78	
*1933 (8 Mo.)	8.73	(Loss)

The amount of the plaintiff's investment in said service stations as of December 31, 1932, was the sum of $2,693,519.

The operating results of said service stations for the first six months of the year 1933, were as follows:

Gross Revenue	932,933.00
**Total Net Loss	35,676
**Average Net Loss per Station	379.50

*Loss. (See note below.)

*The loss for 1933 was after deducting chain store tax upon company owned stations for 6 months. Taxes are entered upon the books as operating charges semi-annually. If the tax had been apportioned for the full eight months the loss would be shown to be $4,572.38 or $48.64 per station. Without the tax the 94 stations would have shown $10,314 net profits for the 8 months.

**Chain Store tax not included as expense.

[fol. 240] The details of the business and earnings of the plaintiff at the service stations owned and operated by it for the years 1930, 1931, and 1932, and the first eight months of the year 1933, as well as various data relating to the same as shown by the plaintiff's books, are set out in the following exhibits which are herewith filed and made part of this stipulation:

Exhibit No. 1. Statement of gross and net earnings of company-owned stations for the years 1930, 1931, and 1932, and the first eight months of 1933.

Exhibit No. 1-a. Gross revenue and volume of business at company-owned stations for the years 1930, 1931, and 1932, and the first eight months of 1933; petroleum products in gallons and dollars, and gross earnings from other products and services in dollars.

Exhibit No. 1-b (1). Revenue from company-owned stations, classified, 1930.

Exhibit No. 1-b (2). Revenue from company-owned stations, classified, 1931.

Exhibit No. 1-b (3). Revenue from company-owned stations, classified, 1932.

Exhibit No. 1-b (4). Revenue from company-owned stations, classified, first eight months of 1933.

Exhibit No. 1-c. Method of arriving at profit or loss, typical company-owned station.

It is agreed that Paragraph X of the bill of complaint, beginning at page 13 of the printed bill, and the exhibits filed [fol. 241] therewith, contained a substantially true and correct description of the service stations owned and operated by the plaintiff, as well as a substantially true and correct description of the bulk plants (page 16), the leased outlets (page 17), and the vending privilege outlets (page 18).

Stipulation as to Bulk Plant Operation

It is agreed that the plaintiff's fifty-two warehouses or bulk plants in the State of West Virginia are places which receive gasoline and other petroleum products from the plaintiff's refineries and in turn deliver the same by tank wagon and motor truck and by railroad shipments to the plaintiff's operated filling stations, the leased and vending privilege outlets, and to individual dealers and consumers.

No sales, except in the occasional instances hereinafter referred to, are made from any of the said warehouses or bulk plants, and none of the usual facilities for retail sales are provided for at the same. The said warehouses or bulk plants are maintained for distribution in their respective areas.

It is agreed that the deliveries of petroleum products made from the company's bulk plants for the year 1932 to its various classes of purchasers and agencies handling the respective products were as follows:

	Gallons
To company-owned service stations	11,285,635
To leased and vending privilege outlets	21,154,104.8
To individual dealers and consumers	16,498,403.9
	48,938,143.7

The details of said deliveries are shown on "Exhibit No. 2" filed herewith.

[fol. 242] The plaintiff has established and is operating throughout the State of West Virginia fifty-two storage plants, known in the petroleum industry as bulk plants. Two additional bulk plants which were in operation on March 8, 1933, have since been closed, reducing the present operating number to fifty-two. These bulk plants were located to serve areas where the greatest potential consumption of plaintiff's products exist, having regard to the availability of facilities for receiving stocks of petroleum products transported by rail or water, or both.

The plaintiff has a capital investment in bulk plants in West Virginia of $1,898,609.76. It also has a capital investment of $485,953.28 in motor vehicle equipment operating from these bulk plants.

A bulk plant consists mainly of steel storage tanks varying in size and number according to the quantity of stored products in a given trade area. Generally, there is erected a warehouse of brick or steel construction, in which is stored other petroleum products packed in barrels, half-barrels, kegs, drums, cases, etc., for supplying the trade demands in the area served from each bulk plant. There is also a pumphouse at each bulk plant with power unit installation for pumping petroleum products from the railroad tank cars into the steel storage tanks located upon the premises.

Tank wagon loading platforms are provided at each bulk

plant to which are run pipe lines with filling arms attached for loading the various grades of motor fuels and kerosene direct from the bulk plant storage tanks into motor tank wagons. If the bulk stocks in the storage tanks are too low to run by gravity, the power pumping units are used to pump them to the motor tank wagon filling platform. There [fol. 243] are garages at the plants which house the motor vehicle equipment in service at each plant. Distribution of the stored petroleum products is accomplished by various methods of delivery to the reselling and consuming trade. All grades of motor fuel, naphthas, kerosene and motor oils are distributed principally by the motor tank trucks. Barrel, case, and package goods are delivered to the trade by motor barrel trucks. From certain of these bulk plants these products are transported by railroad in tank or box car lots to the trade. All of the bulk plants are inclosed with wire fences for the protection of the property, storage and stocks. An additional reason for the wire fences is to discourage any entrance or access by the general public to the property, which policy is necessitated by the general character of the petroleum products stored and handled in the plant. Ready access by the general public would constitute a serious fire hazard because of the average person's disregard of precaution in such matters of personal habit as smoking. There are displayed prominently on fences and buildings "No Smoking" signs to supplement the precautions taken by the plaintiff. The plants are equipped with fire protection equipment, consisting of sand barrels and scoops, fire guns, fire extinguishers, water hydrants, etc.

The location of each of these plants, the personnel by which they are conducted, and the classification and description of their positions are enumerated below:

[fol. 244] **Charleston, West Virginia Branch**

Bulk plant	Station agents	Sub-agents	Plant clerks	Plant-men special	Plant-men	Plant helpers	M. T. slsm.	Del'y Truck opers.	Watch-men	Total
Charleston,	W. Va.	1		2	1	6	4	5	2	22
Beckley	"	1				2	1	5	1	10
Bluefield	"	1		1		1	1	1	6	11
Buckhannon	"		1	1			1			3
Cameron	"		1							1
Clarksburg	"	1		1		1	2	4	1	10
Clendenin	"		1					1		2
Danville	"		1					2		3
Decota	"		1					1		2
Durbin	"		1							1
Ellenboro	"		1					3		4

[fol. 245] Baltimore, Maryland Branch

Bulk plant	Station agents	Sub-agents	Plant clerks	Plant-men special	Plant-men	Plant helpers	M. T. slsm.	Del'y Truck opers.	Watch-men	Total
Fairmont	"	1		1	1	2	1	4	1	11
Gassaway	"		1					2		3
Giatto	"		1							1
Grafton	"		1				2	1		4
Hinton	"		1							1
Huntington	"	1			1	1	2	3	1	9
Iaeger	"		1					2		3
Kimball	"	1				1	1	4	1	8
Logan	"	1				1	1	2	2	7
Marlinton	"		1							1
Milton	"		1							1
Morgantown	"	1				1		4		6
Mullens	"		1					3		4
N. Cumberland	"		1							1
Oak Hill	"		1	1				3		5
Parkersburg	"	1		2				4	1	8
Pt. Pleasant	"		1					2		3
Pratt	"	1				1	1	5		8
Princeton	"		1					1		2
Rainelle	"	1						3		4
Richwood	"		1					3		4
Ripley	"		1					1		2
Ronceverte	"		1					4		5
Sistersville	"		1				1	1		3
Spencer	"		1					2		3
Wayne	"		1							1
Webster Spgs.,	"		1							1
Wellsburg	"	1					1	2	1	5
West Hamlin	"		1							1
Weston	"		1	1			1	2		5
Wheeling	"	1		1	1	4	1	5	1	14
Whitesville	"		1					1		2
Williamson	"	1				1	2	2		6
Total.....		15	29	11	4	22	23	93	13	1 211
Berkeley Spgs., W. Va.		8	1							1
Blaine	"		1							1
Davis,	"		1							1
Elkins,	"	1				1		2		4
Martinsburg,	"	1				1		2	1	5
Petersburg,	"		1					2		3
Romney,	"		1					1		2
Wardensville,	"		1							1
Total.....		2	6			2		7	1	18
Grand Total....		17	35	11	4	24	23	100	14	1 229

Station Agents. The duties of station agents include general supervision of the bulk plant under their jurisdiction; supervision of plant personnel; supervision of tank wagon and barrel truck operation; supervision of the filling and delivering of orders received at bulk plant; supervision of stocks, storage for stocks and control in supply of stocks; supervision of all records, reports, delivery tickets, invoicing, etc., and ordering of stocks from refinery to re- [fol. 246] plenish depleted supply. They are responsible

for the proper receipt and handling of all orders for the trade transmitted by salesmen. They are responsible to the Branch Office of the plaintiff for the entire operation of the plant in their charge. The station agents or others in charge of stations may receive orders, by telephone and otherwise, for deliveries, and see that proper deliveries are made. When available, orders for deliveries are received by station agents or sub-agents.

Sub-agents. This classification applies to the smaller bulk plants. The duties of sub-agents are the same as of station agents, with the exception that they make deliveries to the trade themselves, and spend only sufficient time at the plant to fill orders for delivery on the tank wagons which they operate and to attend to other bulk plant duties. It is necessary that the bulk plant agent remain away from the plant, and, consequently, that the plant be closed the greater part of each day while the sub-agent is making deliveries to the trade. There are 14 bulk plants in West Virginia operated by a single sub-agent. Such plants are known as "one-man" bulk plant operations. There are 21 bulk plants in charge of sub-agents where more than one employee is engaged in plant operation; however, at these plants also the sub-agent in charge is required to drive a motor tank wagon for delivery of products to the trade, spending only part of the time at the plant in performance of his bulk plant duties.

Plant Clerks. Plant clerks are responsible for the handling of all orders for replenishment of stocks, check loading tickets for deliveries to tank wagons, accept tickets and money collected for deliveries made by motor tank salesmen [fol. 247] against products loaded on the wagons at the plant, answer telephone, receive orders by telephone and mail for delivery of goods to the trade under contracts previously made, and instruct plantmen in filling all such orders received.

Plantmen Special. Employees in this classification are found only at plants where the volume of receipts and deliveries of petroleum and other products necessitates considerable supervision in addition to the ordinary duties of plantmen. Plantmen special usually exercise some supervision over motor tank salesmen while they are in the plants, and also are accountable for loading and merchan-

dise records. A more complete analysis shows that a Plantman special loads tank wagons and barrel trucks, makes bills of lading and shipping tags for shipments, makes out delivery tickets for barrel and case deliveries to be made to the trade, sees that all trucks are properly loaded, checks all loading tickets, directs filling of orders, and checks orders to see that deliveries are properly made.

Plantmen. Plantmen's duties consist of cleaning, painting, stenciling and filling barrels and packages; pumping out tank cars, unloading barges, box cars, and filling tank cars, and general labor around the plant, such as housekeeping, etc. Their responsibility also includes proper care of stock records, inventories, and handling of all package goods.

Plant Helpers. Employees in this classification have all the duties of plantmen, such as cleaning, painting, stenciling and filling of barrels, loading tank cars and unloading tank and box cars, looking after stock and inventories, general labor around the plant, and other warehousing duties.

[fol. 248] Motor Tank Salesmen. Motor tank salesmen are men who devote their time to taking orders for motor fuels and other petroleum products against commitments made by dealers and consumers, and to delivering such products direct to dealers and consumers at their places of business through the operation of a motor tank wagon. They have the power to make sales of gasoline, and do make occasional sales, to consumers for cash and as well when a market is found for which no previous commitment has been made. As a matter of fact, such sales are occasional, for the reason that any customer who expects to have comparatively steady requirements for such products is immediately solicited by plaintiff's salesmen in order that commitments for future deliveries, including recognition of the first, may be made.

Orders received at the bulk plant for delivery to reseller and consumer trade against such commitments made by such dealers and consumers are loaaded on tank wagons at the bulk plant. The motor tank salesman then delivers such products to the reseller or consumer, makes his own delivery ticket covering the products delivered, collects for the delivery made or issues a credit ticket in the case

of a credit customer. The motor tank salesman also has a price book in which is listed all regular wholesale prices of all petroleum products for which he may receive such orders for delivery on that or another load or trip. The motor tank salesman makes frequent trips upon regular routes with a motor tank truck, and supplies in a routine manner the requirements of the company-owned stations, the agency stations, and the independent customers of the company. He also makes deliveries upon special orders or requests sent to the Branch Office or the bulk plant.

[fol. 249] Delivery Truck Operators. Delivery truck operators devote their time to the general operation of barrel or truck delivery, delivering freight to freight terminals and/or delivering petroleum products in packages to dealers or consumers on orders previously received by telephone, mail, or on written orders from other employees operating out of the bulk plants. Delivery truck operators do not carry price books, and, therefore, make few sales to the trade for future delivery. Their position is mainly one of delivering orders already received.

Watchmen. Watchmen are employed at the bulk plants who remain on duty during the absence of other employees, particularly at night. Their duties consist of continuous policing of the plant and properties. They record their movements on a punch clock.

General Salesmen. Twenty sales representatives, known as general salesmen, are located at strategic points in the State of West Virginia. A definite sales territory is assigned to each general salesman, who is charged with the responsibility of contacting the dealer and wholesale consumer trade in his territory. The salesman is answerable directly to the wholesale Branch Manager for the amount of such business secured by the company from his territory. They are employed at the Branch Office and receive their compensation and working directions therefrom.

The general salesmen use an annual contract principally in closing their negotiations for business. Different forms of annual contracts are used, depending on the kind of product involved, such as motor fuels, motor oils, industrial lubricants, tires, etc. Under the usual procedure the customer executes the contract in the first instance when the [fol. 250] salesman calls at his place of business and the

salesman then sends the contract to the Branch Office for execution by the company. After the contract is executed by both parties, the customer places orders for products against the commitment as his requirements dictate. Amounts or quantities specified by such contracts are estimates of future requirements, and under the policy of the company no rights are enforced for breach of contract when minimum estimated quantities are not required.

General salesmen also assist all dealers handling the company's products, including individuals who operate their own stations independently of any lease of the premises to the company, by giving them the benefit of any dealer sales-helps that they can utilize in increasing their turnover of Standard products.

In addition to their principal duty of selling, general salesmen are also responsible for bulk plant properties, bulk plant personnel, equipment, stocks, and advertising in their respective territories.

The major reports used at bulk plants are as follows:

Form S. O. 32-B Daily Bulk Stock Report

This report is made up at each bulk plant and is mailed to the Branch Office at the close of each day. It is intended to enable the Branch Office to control and account for all bulk stocks at stations. A completed report gives to the Branch Office all information pertaining to bulk stock inventories of goods on hand, receipts from refineries of tank cars of motor fuel, motor oils, and other bulk products, and amount of sales classified as tank wagon, tank car, and bulk [fol. 251] sales. Bulk sales include the casual, infrequent, emergency deliveries made at the bulk plant, as explained in the subsection hereof headed "Form S-292-A—Bulk Station Daily Report," losses and/or gains in bulk products accruing through the handling of bulk stocks. Motor fuels and other bulk products expand or contract with variations in temperature. For example, a tank car of gasoline, loaded at the refinery at a temperature of 60°, may be received at a bulk plant where the temperature would be 40°. This would cause a contraction of the product in transit; the expansion of the product should show a gain in volume over the amount in volume at which it was loaded. This same report is used for the purpose of recording inven-

tories and receipts at bulk plants. See "Exhibit No. 2-a" filed herewith.

Form S. O. 83—Warehouse Report

A warehouse report is maintained at all bulk plants for the purpose of recording receipts of shipments to plaintiff's own stations as well as for the purpose of recording returned merchandise received from customers in order that customer accounts carried on Accounts Receivable Ledgers in the Branch Office may be properly credited with value of such merchandise returned. This report is made up daily or weekly according to the volume of transactions handled at bulk plants. See "Exhibit No. 2-b" filed herewith.

Form S. O. 271-A—Steel Barrel Report

This report is made up at bulk plants and mailed to the Branch Office daily or weekly according to the quantity of steel barrels handled. The report covers all transactions affecting steel barrels shipped to and from the various bulk plants, as well as deliveries to customers and empty barrels [fol. 252] returned by customers. At the close of each month the Branch Office uses a physical inventory reported by agents on hand to reconcile station stocks with records in the Branch Office. Separate accounts with customers and bulk plants are maintained in the Branch Office for steel barrels. The Branch Office makes all charges and issues all credits to accounts as reported by the respective agents and sub-agents. See "Exhibit No. 2-c" filed herewith.

Form S-83C—Sub-Station Inventory

This report is filled in by agents at the end of the month and represents inventories or quantities on hand by actual count of all the various products carried in stock at bulk plants. Figures as reported on this report are used by the Branch Office to balance station stock accounts of the respective products enumerated thereon. See "Exhibit No. 2-d" filed herewith.

Form S. O. 195—Combination Tank Wagon Ticket and Invoice

This form is issued by motor tank salesmen when delivery of products is made to customers by the motor tank

trucks. The customer signs the ticket acknowledging receipt of the goods. If it is a cash delivery, the motor tank salesman receipts the ticket in the space provided showing the amount of money received.

In the case of cash deliveries, the white or original copy is given to the customer, and the yellow or duplicate copy is forwarded by the agent to the Branch Office with his sales report. When a credit delivery is made the process is reversed. The customer is given the yellow or duplicate copy, and the white or original copy is sent by the agent [fol. 253] to the Branch Office. The original tickets covering all credit sales are sent to the Branch Office by the proper employee at the bulk plant.

This form is also an invoice as no further billing is rendered except in some very special cases where customers have their own forms on which the billing must be made. See "Exhibit No. 2-e" filed herewith.

Form S. O. 270—Delivery Ticket

This form is made up at the bulk plants for all barrel and package goods delivered to the trade by freight or by barrel or delivery truck. Almost all deliveries made from bulk plants for which this form is used, are made against estimated commitments previously agreed upon by the plaintiff and its customers.

The procedure is the same as for Form S. O.-195. In cash sales the customer receives the white or original copy, and in credit sales the yellow or duplicate copy. If delivery is made by barrel or delivery truck to the customer's place of business, the customer signs the ticket for the goods received. If delivery is made by rail or motor freight, the carrier's receipt is the proof of delivery. For all credit deliveries made on this form, the customer is rendered a regular invoice from the Branch Office. See "Exhibit No. 2-f" filed herewith.

Form S-292-A—Bulk Station Daily Report

This report is made up daily by each bulk plant and forwarded to the Branch Office. It includes all sales and deliveries made for the day. All sales made by motor tank

trucks, barrel or delivery trucks, tank cars and by all other methods such as "Bulk at Plant Sales" (which include [fol. 254] occasional and unusual sales where a motorist runs out of gasoline near the plant, and comes to the plant to obtain sufficient gasoline to proceed on his way, or where a farmer comes to the plant for kerosene for his requirements, and the like). This form and the form S. O. 32-B are used for reporting such sales to the Branch Office. However, there is no record of such "Bulk at Plant Sales" kept separately in the Branch Office, or elsewhere, showing this method of delivery. See "Exhibit No.2-g" filed herewith.

With this Bulk Station Daily Sales Report (Form S-292-A) the agent sends, in support, the office copies of the aforementioned Forms S. O. 195 and S. O. 270.

When this report is received in the Branch Office, prices are checked, extensions and additions of all tickets and reports are verified and, where necessary, changes are made. The product sold then becomes a credit to the plant's stock account.

The permanent records at bulk plants are carbon copies of reports which are submitted to the Branch Office periodically. The originals of such reports are mailed to the Branch Office daily, weekly, or as often as required, in order that the office may have available the necessary figures and inventories to complete its monthly report. The various ledgers in the Branch Office are considered the original books of entry.

Each of the bulk plants is furnished information pertaining to all contracts closed (originals of such contracts are retained in the Branch Office) as orders received from customers. Delivery or shipment is made, invoice and billing is rendered according to contract, and all copies of cus- [fol. 255] tomer's orders, together with signed receipt and/or copy of invoice, are forwarded to the Branch Office daily. All accounting work pertaining to the collection of accounts, etc., is handled through a central bookkeeping department located in the Branch Office. Orders are received at bulk plants, by telephone and otherwise, from contract customers and others, and deliveries made thereon to the customer's place of business. Motor tank trucks are operated from the bulk plants over regular routes, and de-

liveries made to company-owned service stations, agency stations, and to customers in a routine manner, as well as upon special orders. All confirmations of orders received at bulk plants, subsequent to the time deliveries of products are made, are forwarded to the Branch Office and constitute permanently filed records showing the authority for making such deliveries.

The plaintiff does not maintain any records such as accounts receivable ledgers, etc., at the bulk plants. Deliveries are made on a delivery ticket signed by the customer's representative indicating receipt of the material. All bookkeeping work in connection with customer's accounts is performed in the Branch Office. The original signed delivery ticket for credit sales is forwarded to the Branch Office; and, after an invoice is prepared, the customer's account is charged accordingly on Branch Office books. As accounts for all customers are kept in the Branch Office, the plaintiff's agents and other representatives are authorized to give customers receipts for collections to apply on their accounts. This money is remitted to the Branch Office at the end of the day. The amounts are applied to customers' accounts and such credits appear on statements [fol. 256] mailed to customers at end of month. If the customer pays cash at the time products are received by him, the plaintiff's representative receipts the original ticket, and surrenders it to the customer as a receipt of full payment for such delivery. At the end of the day agents remit to the Branch Office by Cashier or Exchange Check for all cash and checks received daily. None of the plaintiff's agents are permitted to deposit the Company's money in local banks. The only drawing account maintained by the West Virginia Branch Office in the name of the plaintiff, is at the Charleston National Bank of Charleston, West Virginia.

The trade served from these bulk plants consists of service stations owned and operated by the plaintiff, agency stations, individual dealers, tank wagon commercial consumers, industrial consumers of petroleum products, the State of West Virginia (whose business is received from its various governmental departments and institutions), the various political sub-divisions of the State of West Virginia such as counties, towns, and school districts, etc., and the occasional bulk-at-plant consumer.

In classifying its trade as set forth above, the plaintiff defines an agency station as one operated under a petroleum vending privilege or station lease and a commission agency agreement (See Exhibits E, F, G & H, with bill). The operator of such a station is an agent of the plaintiff for the sale of petroleum products to consumers. As to other products of the plaintiff handled by such operator, no stipulation is made hereby as to whether the operator is an agent of the plaintiff or not; but it is agreed that such additional products are handled under contracts between the company and the operator, forms of which are herewith exhibited.

[fol. 257] An individual dealer is one to whom is sold petroleum and other products which the dealer desires to handle at his place of business for resale to the motoring public. A motor fuel and/or other merchandising agreement is executed between such dealer and the plaintiff covering the annual purchases which the dealer desires to make.

A tank wagon commercial consumer is one with whom the plaintiff has executed a contract covering his estimated annual consumption of petroleum and other products. These products he will use in his own equipment. To illustrate: A road builder will contract with the plaintiff for an estimated volume of refined petroleum and/or other products covering one year's requirements. He has pump and tank equipment for receiving, storing and dispensing such motor fuels and other petroleum products, and uses these products in operating his own equipment, including trucks, tractors, road scrapers and gasoline shovels.

An industrial consumer is one who has executed with the plaintiff memoranda of agreement and/or contracts covering his annual requirements of petroleum and other products, which are used entirely for the operation of his own equipment. To illustrate: The conduct of a coal mine requires various grades of motor fuel, oils and greases for operating lubricating bearings, chains, gears, slides, mine car wheels and other moving parts of machinery. These products are usually handled in bulk, barrels, and cases, sometimes in tank cars. Delivery is made from the bulk plant to the mine in such packages and by such methods as the particular requirements necessitate.

[fol. 258] Delivery of "Standard" products from bulk plants to the plaintiff's customers consists of filling orders covered principally, but not entirely, by periodical commitments between the plaintiff and its individual resale and consumer customers. These do not include company-owned and operated stations, or agency stations.

Periodical commitments are memoranda of agreement or contracts which the plaintiff executes with the resale and consumer trade covering their requirements for a period of one year. Such commitments describe the kind of products bought and to be delivered, and fix the price at which deliveries will be made during that period of time, which are stated to be the regular posted prices of the plaintiff in effect at the time of delivery. Orders are placed against these commitments at various periods during the year, ordinarily in equal monthly installments. The bulk plants then keep sufficient stocks of the designated products on hand for delivery as such orders are received. Attached hereto as exhibits are copies of the forms of all memoranda of agreement and/or contracts used for the several purposes mentioned, as follows:

Exhibit No. 2-h, Memorandum of Agreement, Motor Oils and Greases.

Exhibit No. 2-i, Memorandum of Agreement, Industrial Oils and Greases.

Exhibit No. 2-j, Varsol Sales Contract.

Exhibit No. 2-k, Atlas Battery Agreement.

Exhibit No. 2-l, Atlas Tire Agreement.

Exhibit No. 2-m, Industrial Fuel Oil Contract.

Exhibit No. 2-n, Commercial Users Tank Wagon Sales Contract.

Exhibit No. 2-o, Kerosene Contract.

Exhibit No. 2-p, Motor Fuel Sales Contract.

[fol. 259] The plaintiff contends that the bulk plants are merely supply depots, from which petroleum and other products are transported to the points of delivery. The defendant admits that these plants serve as supply depots, but does not admit that they are only supply depots, and contends that they are wholesale stores within the meaning of House Bill No. 112. As stocks are depleted at bulk plants, they are replenished directly from the plaintiff's refineries, shipped by barge, tank cars, or, in the case of barrel and package goods, in carload lots.

Stock in Bulk Plants

Bulk plants are equipped with sufficient bulk storage and warehousing capacity to provide storage for a supply of petroleum products that will permit these plants to properly fill all orders received against commitments previously agreed upon as stipulated in contracts affecting future deliveries, as well as additional non-commitment orders, if any. The station agent or sub-agent at each bulk plant supervises all stocks stored in that plant. He keeps a perpetual inventory on a stock card system that is posted daily, and reported to the branch office, and each day orders are placed by him through the branch office to replenish the supply. The stock at a bulk plant is continually changing, and does not permit of any great amount being kept on hand for an extended period. A central stock control is maintained in the branch office at Charleston, West Virginia. Each bulk plant agent prepares a daily stock report showing receipts, deliveries, and stocks on hand, and forwards the same to the branch office at the close of each day. The requirements for stocks at bulk plants are estimated through the use of a contract card [fol. 260] system and estimated casual requirements, which records all commitments, contracts or agreements for future deliveries of products stored at the bulk plants. Orders are placed with the refinery by the central stock control department at the branch office. A sufficient supply of stock is maintained at the bulk plants to provide for requirements of the trade.

Stocks at Stations

Service Stations. Stocks are checked daily by actual inventory count or measurement at the time when one shift relieves another shift. The result of the inventory is recorded on a daily report and the salesman going off duty must account to the company for the difference between the inventory at the time he goes off duty and the inventory at the time he came on duty, either in cash, by transfers, or by credit sales.

Agency Stations. The tank wagon salesman with the agent checks the stock of consigned products and the tank wagon salesman makes replacement of the amount of goods sold since the last stock-taking. The agent settles with the

tank wagon salesman for the amount of goods sold, equivalent to the amount of goods so placed.

Dealer Stations. Stock-taking at these stations is entirely at the discretion of the individual dealers; he keeps such records as he sees fit. The tank wagon salesman assists him in making an inventory of his stock of Standard products at the time the tank wagon calls to replenish the dealer's stock of these goods.

It is agreed that the average normal cost to the company of installing the agency station, including vending [fol. 261] privilege outlets, is approximately $450.00, which includes the cost of equipment and the installation of the same. The corresponding cost of equipping an individual dealer to sell the company's products is approximately $400,00, the dealer paying the cost of installation.

The average tankage capacity of various stations with the approximate annual turnover at such stations is as follows:

Stations	Tankage capacity in gallons	Annual turnover based on 50% capacity of tankage
Company-owned Stations	4,000	50
Agency Stations	1,500	35
Individual Dealer	1,200	25–28
Bulk Plant	130,000	7

The average estimated turnover of merchandise other than petroleum products per year is as follows: Tires, 8; motor oils, 6; industrial oil, 4; kerosene, 2.5.

The average haul by motor truck between the company's bulk plants and the various stations at which deliveries are made is 7.5 miles, or 15 miles per round trip.

Leased Outlets and Vending Privilege Outlets

It is agreed that the leased outlets and vending privilege outlets are operated pursuant to the terms of Exhibits E, F, G, and H, filed with plaintiff's bill of complaint. It is agreed that the method of operation is substantially as follows:

If the station is a leased outlet, the plaintiff takes a lease on the premises for a definite term on form "Plaintiff's

Exhibit E." By the terms of the lease, the plaintiff pays the lessor a rental of one cent for every gallon of motor [fol. 262] fuels sold therefrom. If the outlet is a vending privilege outlet, the plaintiff enters into a vending privilege agreement (Plaintiff's "Exhibit G") and pays a similar rental. In the case of a leased outlet, the plaintiff and the agent enter into a "Commission Agency Agreement" ("Exhibit F") and in the case of a vending privilege outlet, they enter into a "Commission Agency Agreement" ("Exhibit H").

Under the terms of operation, the plaintiff furnishes an initial stock of petroleum products without charge to the agent, and as replacements are made (or at other times) remittances for the products sold are made to the plaintiff. The petroleum products on hand at all times are the property of the plaintiff, and the plaintiff makes it a practice to strictly comply with the Factor's Statute of the State of West Virginia, Code, ch. 47, art. 8, sec. 1, requiring one transacting business as agent for another to give certain notices, by signs and publication, disclosing the name of his principal.

All employees at the stations are employed, compensated and discharged by the agent. The plaintiff authorizes credit sales to certain consumers of its products, and when so authorized, the credit risk is assumed by the plaintiff and credit given the agent for deliveries to such consumers. The compensation of the agent consists of the commission stipulated in the agency agreements, which is, with practical uniformity, the sum of 2½ cents per gallon for all gasoline sold at the station, and certain stipulated amounts for oils and greases. The vending equipment is the property of the plaintiff. Other conditions of operations are as set forth in said Exhibits filed with the bill of complaint.

At the agency stations, the agents have the right to deal [fol. 263] in and sell any products they may desire other than the petroleum products of the plaintiff. If such additional products are obtained from the plaintiff, they are handled under the contracts exhibited herewith as Exhibits No. 2-j, 2-k, and 2-l, and upon terms stated therein. The salesmen of the company solicit the business of the agents at these stations in their regular calls upon the trade in general. The parties do not stipulate hereby as to whether

the so-called "agents" are the agents of the plaintiff as to such products other than petroleum products. As part of the lease and agency agreement, the company at its own expense paints the signs and equipment used on the premises in a uniform style used throughout the territory.

The first agency of the company was established in West Virginia in 1930. At the beginning of the year 1931, the company had in operation 341 such stations, the greater number of which were opened in November and December of 1930. The number of additional stations opened in 1931 are shown in the following table:

January 1, 1931	341
January	73
February	55
March	52
April	49
May	66
June	27
July	41
August	36
September	24
October	19
November	18
December	14
Total agency stations in operation December 31, 1931	815

[fol. 264] It is agreed that, if called as witnesses, that accountants and officers of the company would testify that in the year 1932 the plaintiff delivered 21,154,104.8 gallons of petroleum products, not including kerosene, through 948 leased and vending privilege outlets in the State of West Virginia; that the gross revenue from such sales, including gallonage tax, amounted to $3,690,397.02; that the plaintiff does not keep separate profit and loss statements for the said outlets, since the cost of auditing the accounts for that number of stations would be onerous; that the average profit or loss to the plaintiff from the operation of said outlets is determined basically by the difference or spread between the retail selling price of the products and the cost price (as billed by the refinery), from which there is deducted the portion of wholesale and delivery

costs allocable to the station; that the determination of this basic average involves a consideration of freight differentials and variations in volume of business done at the said outlets; that they have ascertained the net earnings to the plaintiff in 1932 at 124 of said outlets, selected with due regard to volume of business and freight differentials, as a representative cross section of all such outlets in the state; and that the net earning figures for the said 124 outlets, which are used as a basis of computation, are taken from the books and records of the plaintiff, that they are properly and correctly determined in accordance with the bookkeeping practice of the company and with general accounting principles.

It is agreed that the said witnesses would further testify, if called, that in auditing each of the said 124 outlet accounts so selected, they first determined the proceeds realized from sales and deducted therefrom the agent's commission, rent, motor fuel taxes, cost of products billed by the refinery, plus freight to the bulk plant supplying [fol. 265] the outlet, and all general overhead and delivery charges allocated on a gallonage basis; that the difference between gross revenues and expenses reflected the net earnings on the products consigned to the outlet; that these net earnings were reduced to a weighted profit per gallon of motor fuel sold, which was then applied to the gallonage sold at each of the other 824 outlets; that the plaintiff's profits from marketing consigned petroleum products at the said 948 outlets for the year 1932, so computed, amounted to $85,085.60, or an average of $89.75 per outlet; and that "Exhibit No. 3", filed herewith shows the result of marketing petroleum products at said 948 outlets for the year 1932.

It is agreed that said witnesses would further testify, if called, that in the year 1931, the plaintiff sold 20,961,353.7 gallons of petroleum products through 815 leased and vending-privilege outlets; that the gross revenue from such sales, including gallonage tax, amounted to $3,440,589.28; that the earnings at the said outlets for 1931 were determined by relating the 1931 spreads (difference between retail selling price of the products and the cost price as billed by the refinery) and the 1931 operating expenses to those of 1932, respectively; that the 1932 weighted average profit per gallon of motor fuel sold was adjusted ac-

cordingly, and the weighted average net profit per gallon of motor fuel sold was thus determined for 1931; that this figure was then applied to the gallonage sold at each of the said 815 outlets; and that the plaintiff's profits from marketing consigned petroleum products at the said 815 outlets for the year 1931, so computed amounted to $141,690.88, or an average of $173.85 per outlet.

[fol. 266] It is agreed that if the said witnesses were called, they would testify that in the first six months of 1933, 8,155,961.4 gallons of the plaintiff's petroleum products were distributed through 856 leased and vending privilege outlets; that the gross revenue from such sales, including gallonage tax, amounted to $1,186,006.39; that the net losses at these outlets for the first six months of 1933 were determined through relating the 1933 spreads (difference between retail selling price of the products and the cost price as billed by the refinery) and the 1933 operating expenses to those of 1932, respectively; that the 1932 weighted average of profit per gallon of motor fuel was adjusted accordingly, and the weighted average net loss per gallon of motor fuel sold was thus determined for the first six months of 1933; that this was then applied to the gallonage sold during that period at each of the said 856 outlets; and that the plaintiff's losses from marketing petroleum products consigned to these 856 outlets for the first six months of 1933, so computed, amounted to $53,905.45, or an average of $62.97 per outlet.

It is agreed that if said witnesses were called, they would testify that the gross revenue of the plaintiff from sales of petroleum products at all the said 948 outlets for the year 1932 amounted to $3,690,397.02, distributed between the leased outlets and the vending-privilege outlets as follows:

	Gross revenue	Per outlet
427 Leased Outlets	$2,346,799.87	$5,496.02
521 Vending-privilege Outlets	1,343,597.15	2,578.88
948 Outlets	$3,690,397.02	$3,892.82 (Av.)

[fol. 267] It is agreed that if said witnesses were called, they would testify that the total price of all tires and tubes sold by the plaintiff in the year 1932 to agents operating service stations under lease or vending privilege contracts

amounted to $97,280.55; that the amount of all other products sold by the plaintiff to such agents is not separately recorded by the plaintiff, but the total of such products sold to such agents and all other purchasers (outside of company-owned stations) amounted to $26,352.33 in said year; that the vending privilege contracts ordinarily cover two gasoline pumps at a site, with tanks to supply the same; that for the year 1932, the net profit to the company from all sales of petroleum products to such vending-privilege outlets, upon the basis of the aforesaid computations, amounted to $28,809.55, or an average of $61.17 per outlet; that only seven of such vending-privilege outlets showed sufficient net profit in that year to pay the amount of the average chain store tax chargeable to the plaintiff, as estimated by the defendant herein; and that additional data relative to the operations and business of said leased and vending-privilege stations is shown in the following exhibits filed herewith and made parts of this stipulation:

Exhibit No. 3. Recapitulation of operating results of leased and vending privilege outlets for the year 1932.

Exhibit No. 3-a. List of leased and vending privilege outlets, showing gross revenue and net earnings, petroleum products sold, gross revenues and net earnings, by outlets, for the year 1932, with rate of net earnings in terms of profit per gallon of motor fuel; classified in nine sections by number of gallons handled annually, from 0-10,000 gallons to gallonage over 100,000.

[fol. 268] Exhibit No. 3-b. Operating results of leased and vending privilege outlets for 1931.

Exhibit No. 3-c. Operating results of leased and vending privilege outlets for first six months of 1933.

Exhibit No. 3-d. Statement of sales of tires and tubes to leased and vending privilege outlets, 1932.

It is agreed that the various net operating figures (excepting those stated to be computed), including figures of net profit and/or net loss, herein contained, are shown in or obtained from the books and records of the plaintiff; that the said net operating figures have been ascertained by the accountants of the plaintiff who are experienced and competent; that, if called as witnesses, said accountants and

the officers of the plaintiff would testify that the said figures (except where stated to be computed) are taken from the books of the company, and that they have been properly determined in accordance with the bookkeeping practice of the company and with sound accounting principles, and to their best knowledge and belief said figures are correct; and that, as to those figures herein stated to have been computed, they would testify the same to have been fairly and accurately computed, as hereinbefore stated, and that the method of computation is in accordance with sound accounting principles and business practices. It is stipulated that the agreement between the parties as to all figures herein contained, purporting to show amounts of net profit or net loss, extends no further than as stated in this paragraph, and this provision shall apply to all the figures contained herein showing or purporting to show the net profits and/or net losses of the plaintiff, whether from its entire business, from its refineries, from the service sta- [fol. 269] tions owned and operated by it, from the said leased outlets and vending privilege outlets, or from any other source.

Individual Dealer Stations

The plaintiff's various grades of gasoline are sold to individual dealers at a fixed rate, which is three cents per gallon less than the retail price prevailing at the time at the company's owned and leased stations, and the company furnished to such individual dealers, free of charge, until recently forbidden by the petroleum code under the National Recovery Act, the necessary tanks and pumps for handling the same, which are also uniform in style and appearance with those used in the company's own stations. The company also furnishes advertising signs to such dealers, substantially the same as those furnished to agency stations except that the word "agent" does not follow the name of the dealer. The value of such equipment lent to dealers amounts to $225,000.

Until so prohibited by regulations adopted under the National Recovery Act, the plaintiff painted the fronts of the buildings of individual dealers in a style similar to that used in and about the premises of agency stations and of those operated by the company.

The plaintiff also furnishes to individual dealers handling its products, either free of charge or at less than their cost to the plaintiff, advertising matter for the use of the dealer or for free distribution to his trade. Such dealers are urged to attend, and do attend, the regional conferences held by the plaintiff for the benefit of its employees and agents for the promotion of sales of the plaintiff's products and the service rendered by it to the motoring public. No dis-[fol. 270] counts are allowed on sales to dealers, nor on any other prices or sales referred to herein.

The company sold its products to 557 such individual dealers in West Virginia in 1932 and at the date of the passage of the Act in question.

It is agreed that competent witnesses for the plaintiff would testify that the company's books show that for the year 1932, the average spread between the refinery billing price, at which motor fuel was charged by the refineries to the marketing department of the plaintiff company, and the posted retail price at which the same was sold to the public at the company-owned service stations, amounted to 6.65 cents per gallon; that the portion of the company's wholesale expense allocable to the gallonage distributed through the company's service stations, including branch office expense, bulk plant expense, tank wagon expense, and proportionate overhead expense of the general office in New York, amounted to 2.50 cents per gallon upon said gallonage, and the retail sales promotion and supervision given to the service station from the branch office added .30 cents to this amount, or a total expense of 2.80 cents per gallon excluding the expenses of operating the service stations; and that the wholesale expenses allocable to the gallonage distributed through the leased stations, vending privilege outlets, and individual dealer outlets, for the same year amounted to 3.17 cents per gallon.

Stipulation as to Paragraph XI of the Bill of Complaint

It is agreed that all of the taxes set forth in paragraph XI of the bill of complaint were regularly paid to the State [fol. 271] of West Virginia and its political sub-division for the years 1930, 1931, and 1932.

Defendant does not admit that the excise or gallonage tax imposed by Section 2, Article 14, Chapter 11, Code of West Virginia, is a tax imposed upon the plaintiff, but asserts

that said tax is a tax upon the consumers of gasoline, collected by the plaintiff for the State. It is agreed and stipulated, however, that the plaintiff is unable in some instances to collect from customers for gasoline purchased on credit from it, that in such instances the payment of the gallonage tax by the plaintiff is an out of pocket expense because of its inability to collect such accounts, and that the plaintiff is without the right of refund from the State for the gallonage tax which it has paid to the State in respect to such uncollectible accounts.

It is not admitted that the license tax imposed by Section 2, Article 14, Chapter 11, Code of West Virginia, is a tax upon the privilege of operating filling or service stations, defendant asserting that said tax is a registration tax or fee in aid of and incident to the collection of the gallonage tax.

It is agreed that in the conduct and operation of its business in the State of West Virginia plaintiff has acquired and owns real and personal property, the book value of which as of December 31, 1932, was as follows:

[fol. 272] Filling or Service Stations	$2,763,693.92
Bulk plants	1,898,609.76
Refinery	1,702,406.85
Vending equipment and other personal property	865,655.18
Automotive equipment	485,953.28
	$7,716,318.99

General Business of Plaintiff and Sources of Supply

It is agreed that the plaintiff is engaged in the refining, transportation, and distribution of petroleum products. The plaintiff directly owns no oil-producing properties. The oil which it refines in its Parkersburg refinery is purchased by it from the Carter Oil Company, a corporation of which all the stock is owned by the plaintiff. The Carter Oil Company produces approximately one-third of the oil handled by it, and purchases two-thirds from other producers and royalty owners. The price paid by the Parkersburg refinery for the oil so purchased by it is the posted price which the Carter Oil Company pays for its purchased oil, plus an additional five cents per barrel, which amount is

intended to cover the expense of purchasing, handling and selling the oil. The cost to the refinery also covers the transportation charges by way of pipe line, all of which are fixed by tariffs filed with the Interstate Commerce Commission.

The oil so purchased at the Parkersburg refinery travels through some or all of the following pipe lines: Oklahoma Pipeline Company, Ajax Pipeline Company, Illinois Pipe-
[fol. 273] line Company, Tuscarora Oil Company, Ltd., Southwest Pennsylvania Pipeline Company, and Eureka Pipeline Company. The interest of the plaintiff in each of said companies is as follows:

(1) Oklahoma Pipeline Company. Stock owned by the plaintiff.

(2) Ajax Pipeline Company. Plaintiff and Carter Oil Company together own less than voting control of the stock of the Ajax Corporation which in turn owns the stock of the Ajax Pipeline Company.

(3) Illinois Pipeline Company. No interest.

(4) Tuscarora Oil Company, Ltd. Shares held by individuals who in turn hold them for the benefit of the plaintiff.

(5) Southwest Pennsylvania Pipeline Company. No interest.

(6) Eureka Pipeline Company. No interest.

The automobile tires, tubes, batteries, spark plugs, and other accessories handled by the plaintiff are purchased by it from the Atlas Supply Company. Twenty per cent of the stock of the latter company is owned by Stanco, Incorporated, a corporation the stock of which is entirely owned by the Standard Oil Company (the New Jersey corporation). The tires handled by said Atlas Supply Company are purchased by it from various tire manufacturers.

Witnesses for the plaintiff would testify that according to the company's books in the last three years the plaintiff
[fol. 274] has sustained net losses in its refinery operations as follows:

1930	$8,856,129.77
1931	19,237,052.44
1932	12,599,703.48

Net losses at the Parkersburg refinery were as follows:

1930	$735,826.33
1931	1,169,912.53
1932	1,050,036.34
1933 (4 Months)	340,396.71

The refinery prices at which petroleum products are billed from the Parkersburg refinery and other refineries of the company, to the marketing departments in its various branch offices, are fixed from time to time by the New York office of the company, which prices approximate those currently reported as open market prices in their respective regional market areas. No discounts are allowed from such prices. Prevailing market prices are compiled and published each week by such trade journals as National Petroleum News and Platt's Oilgram (both published in Cleveland, Ohio) and the same are recorded in the "Oil Price Handbook" compiled and issued annually by the National Petroleum News and other publications. The refinery billing prices of the company have not been based upon the cost of production in the company's refineries. Recognized regional or primary markets for petroleum products are found in certain oil-producing sections, such as Oklahoma, Western Pennsylvania (including West Virginia), Ohio, Kansas, California, North Texas, East Texas, West Texas, North Louisiana and Arkansas, the last five being [fol. 275] sometimes designated as the "Gulf" markets. According to the Oil Price Handbook there are 42 companies operating approximately 52 oil refineries within the Western Pennsylvania regional market area, which includes West Virginia.

Of the motor fuels produced at the Parkersburg refinery of the plaintiff, approximately 99 per cent are marketed in the State of West Virginia.

It is agreed that there is at all times a recognized posted market price on the various grades of crude oil produced in the several oil-producing sections of the country, fluctuating with the supply of such oil, which price is adhered to by producers and dealers in buying and selling the same.

It is agreed that in the years 1930, 1931, 1932, and the first eight months of 1933, the retail posted prices of gaso-

line promulgated by the principal distributors in the State of West Virginia, as a general rule have been uniform at the same time and place in the several trade areas of the state.

Competent witnesses on behalf of the plaintiff would testify that the operating results of the plaintiff covering its entire business for the years stated are shown in the following table:

[fol. 276]

	1930	1931	1932
Invested capital (capital and surplus)	$351,534,206.00	342,687,804.00	339,161,868.00
Gross operating revenue	354,943,832.00	238,066,602.00	240,143,591.00
Net income from operations	**7,047,326.00***	**15,331,244.00***	**11,126,045.00***
Profit — Marketing Dept.	3,270,448.79	6,142,646.44	5,734,144.39
Profit—Refineries	**8,856,129.77***	**19,237,052.44***	**12,599,703.48***
Profit — Other business of company	11,551,879.48	7,421,082.77	4,803,551.60
Dividends received	9,106,065.00	4,509,962.00	5,987,921.00
Interest received	3,382,008.00	5,126,751.00	2,697,028.00
Other sources	525,651.00	21,207.00	1,620,911.00
Net earnings available for dividends and surplus	5,966,198.00	**5,673,323.00***	**4,062,007.00***

(*Bold face figures—loss.)

The net profit of the plaintiff from all wholesale and retail sales of its products in the State of West Virginia for the years referred to was as follows:

1930	$434,805.04
1931	665,811.49
1932	272,799.73

It is agreed that the following table correctly shows the gross revenue, material costs, operating expenses, and net earnings of the business of the plaintiff in West Virginia, as shown by its books, for the years 1928 to 1932, inclusive:

[fol. 277] Statement of Sales Showing Gross and Net Earnings for 1928, 1929, 1930, 1931 and 1932

	1928	%	1929	%	1930	%	1931	%	1932	%
Gross Revenue...	12,308,481.78	100%	14,158,036.55	100%	14,902,038.72	100%	12,521,445.39	100%	10,198,453.32	100%
Material Cost....	9,905,204.01	80.47%	11,039,700.04	77.97%	11,648,275.37	78.17%	9,162,295.82	73.17%	7,757,384.66	76.06%
Gross Earnings...	2,403,277.77	19.53%	3,118,336.51	22.03%	3,253,763.35	21.83%	3,359,149.57	26.83%	2,441,068.66	23.94%
Operating Expense	1,689,950.79	13.73%	2,266,362.48	16.01%	2,818,958.31	18.91%	2,693,338.08	21.51%	2,168,268.93	21.26%
Net Earnings.....	713,326.98	5.80%	851,974.03	6.02%	434,805.04	2.92%	665,811.49	5.32%	272,799.73	2.68%

[fol. 278] Operation of West Virginia Branch Office

The West Virginia branch of the plaintiff, with office at Charleston, is in charge of a branch manager, who is responsible for the proper conduct of the company's sales business and the observance of its sales policies. He is assisted by an assistant branch manager, whose special duty is to supervise the operation of service stations and the distribution of products from the bulk plants. The operations of the West Virginia branch office are typical of the other branch offices of the company.

The branch manager and assistant branch manager delegate certain duties and responsibilities to various department heads and marketing assistants, namely, the branch sales assistant, lubrication assistant, marketing assistant, maintenance superintendent, and chief clerk of the accounting department. These in turn have various assistants who superintend the operation of their respective departments. Certain department heads have direct charge of the maintenance of bulk plants and the distribution of products therefrom, and the operation of service stations. The business transactions of the branch are handled chiefly through the sales, marketing, lubrication, and accounting departments.

Sales and Marketing. The branch sales assistant and marketing assistant are responsible for the sale and distribution of gasoline and refined oil, and all petroleum products other than those handled by the lubrication department; also all non-petroleum products distributed in the territory of the branch. The marketing department employs and exercises supervision over general salesmen who travel throughout the territory making contracts for the [fol. 279] sales of their products and also supervises the work of the station agents of the company and motor tank wagon salesmen in charge of bulk stations. All contracts must be approved by the branch manager. This department handles and keeps records of all sales contracts made by the salesmen. Deliveries under such contracts are made either from bulk plants or from refineries of the company, as circumstances may dictate.

Lubrication Department. As a matter of operating practice, the lubrication business of the branch is handled in a department separate from the motor fuel and general sales

divisions. The lubrication assistant is the head of this department, and has general charge of the marketing of all lubricating oils and petroleum specialties. He is responsible for the ordering of stocks, transportation to the bulk plants, warehousing, the establishment of sales policies within the branch, and the procuring of contracts for the sale of lubricants to dealers and consumers. Lubrication experts assist the general salesmen in the sale of products and advise salesmen, consumers and prospective consumers in the technical phases of lubrication.

The functions of the Accounting Department are subdivided as follows: (a) stock department, (b) credit department; (c) service station department; and (d) billing department.

Stock Department. This department of the branch office keeps records of all stocks of gasoline, petroleum products, and all other products kept at the various bulk plants under its supervision, and from which it receives periodical reports. It is the function of the department to see that all bulk plants are kept supplied with adequate stocks to [fol. 280] fill orders received and take care of the needs of the company's various station outlets and its individual customers. The department acts as a clearing house for the transmission of stock orders from all stations to the proper bulk station or refinery for delivery. It keeps check on the supplies on hand at the bulk plants, and the capacity of the various plants, and when supplies are depleted to certain stated points, the stock department orders shipments from the refineries or other sources of supply to replenish the stock. Through the salesmen operating from the branch, the same kind of check is maintained upon the service stations of the company and the leased and vending privilege outlets, and the stocks of such stations are kept and maintained at a required standard adequate to meet the anticipated demands. Stock ledgers are kept which are permanent records of all receipts and distribution of the various products from the several bulk plants, based upon periodic reports transmitted by them to the branch office, and from these records monthly inventories are made up for report to the New York office of the company.

Credit Department. There are kept in the accounting department all ledger accounts representing accounts re-

ceivable for deliveries made on credit through bulk plants and retail service stations operated within the territory of the branch. All such deliveries are reported to the accounting department, and all collections received by field representatives for application on customers' accounts are likewise forwarded to it, and statements are mailed monthly to all customers from the branch office. The credit manager ultimately passes upon the credit of all customers purchasing on a credit basis; and all correspondence pertaining to the collection of customers' accounts is handled [fol. 281] by this office.

Service Station Department. This department handles all accounting work, prepares sales statistics and reports pertaining to the retail service stations operated by the company under this branch. After sales reports are forwarded from service stations to the branch office, complete verification is made of all entries thereon, credit tickets are priced and extended, postings are made to customers' invoices, and at the end of the month invoices covering customers' entire purchases for the month are mailed to the customers, supported by copies of tickets covering each individual purchase. As service station operators remit to branch office daily for cash and collections, there is maintained in this department a permanent record of all cash sales and adjustments.

Billing Department. Upon reports of deliveries from the bulk plants and/or company filling stations, the billing department checks the prices and extends the totals on all accounts. It is the duty of the department to see that all deliveries are charged for either at the prices stated in the contracts on file with the branch, or at the prevailing posted prices in effect at the time delivery is made. It also checks deliveries against inventories and reconciles its records with the reports made by the bulk plants.

Through the foregoing and other departments, the branch manager maintains supervision over all of the selling representatives in the branch, over the transportation of products, the supplying of necessary stocks to the bulk plants and stations, and the keeping of the company's accounts with its customers.

[fol. 282] Training of Service Station Employees, Agents and Dealers

Company Service Station Employees. New employees at company service stations ordinarily receive two weeks' intensive training at training-stations. Emergencies arise at times which prevent an apprenticeship at such training-stations. The managers of the stations, to which the new employees are regularly assigned, continue the process of practical training. Periodic discussions in group meetings, and occasionally the showing of sound pictures, provide additional instruction in all details of meeting the motoring public and of servicing motor vehicles.

Agents in Charge of Leased Stations. Many operators of leased and vending-privilege outlets were formerly employees at company service stations and have received the same initial training. Other agents have employed men who were trained in the course of previous employment at company service stations. In the absence of either of these situations, inexperienced agents and their employees are instructed by the company's sales representatives by means of discussion and practical demonstration at the agents' stations and at group meetings. Occasionally, the demonstrations are conducted through the medium of sound pictures. While the training of agents and their employees is not a continuous process, it is carried on intermittently as long as the men continue in such capacity.

Individual Dealers. Individual dealers handling "Standard" products, at their election, are trained in the rendition of "Standard" service in the same manner as the agents at the leased and vending-privilege outlets. They are [fol. 283] given the same instruction, if they so desire, and are encouraged to attend meetings held by the company's sales representatives for discussion and demonstration.

Physical and Economic Characteristics of Service Stations of Plaintiff and Competing Companies

Certain characteristics and operating factors are common to all service stations and outlets, whether operated directly by an oil company or its agents or an individual dealer. In practically all communities in the state, all service stations sell the same or equivalent grades of motor

fuel to the public at the same price. In some places certain stations sell inferior grades at reduced prices, but when competitors begin to market similar grades, all stations sell these inferior grades at the same prices. Ordinarily, changes in the price level of petroleum products in a community apply to all service stations.

A factor common to all types of stations is the amount of manpower which is required in order to supply the necessary service for the trade. As different employers pay different rates of wages, operating expenditures vary at different stations, but the relation of man-hours to gross revenue over a given period of time is approximately the same at all outlets similarly situated and of comparable physical characteristics.

Accountants of the plaintiff have made a study of ten service stations owned and operated by the company, ten agency stations, and ten stations owned and operated by individuals, in the year 1932, and it is stipulated that, if called as witnesses, said accountants would testify that the [fol. 284] respective stations were selected at different points well distributed over the state, and represented stations of various amounts of sales, and that the amounts of gross sales per man-hour at the thirty stations so investigated, are as follows, respectively:

Company-owned stations	$2.66
Agency stations	2.64
Individually-owned stations	2.44

A fairly constant factor in the operation of all service stations consists of utility charges for light, power, heat, and water. Public service companies furnish light to the station for night service, power for air compressors for the operation of lifts and grease guns and tire inflation apparatus, heat for the small office room in the winter, and water for servicing automobiles, cleaning the premises, and supplying toilet facilities where available. Company-operated stations are subjected to these expenses in practically the same degree as agency stations and individual dealer stations.

The company's accountants who investigated the thirty stations above mentioned, would further testify that at said stations in the year 1932, the respective percentages of utility charges to gross sales were as follows:

Company-owned stations	1.88%
Agency stations	1.42%
Individually-owned stations	2.20%

The benefit of any improvement of products through research work is passed on to the dealers, in that all dealers obtain the same grade of products as the company stations. [fol. 285] Until recently prohibited by the petroleum code as aforesaid, the company supplied vending equipment to all dealers for handling its bulk products. No distinction was made between individual dealers and agency stations and every dealer was supplied with all the equipment necessary for his trade. Tanks and pumps are not now supplied except where they have already been installed.

The company uses various advertising media. Painted bulletin boards and poster boards are placed at strategic locations throughout the state in order to attract the attention of as many motorists as possible for the investment involved. One line of products, equally available at company-owned stations, all individual and agency dealers, is advertised on these bulletins and posters. There is no expense upon the dealer for this advertising. The company likewise advertises its products, which all the dealers have for sale, in 63 newspapers in West Virginia having a wide circulation, and also in numerous magazines which have a large distribution throughout the state. The cost of this advertising in West Virginia for the last three years was as follows:

1930	$212,176.38
1931	160,272.15
1932	134,313.55
	$506,762.08

Under a cooperative advertising plan, the company provides advertising material to the individual dealer at a cost of ½ to ⅔ of the actual cost of the material. This type of advertising consists of customer calendars bearing the name of the dealer, and direct mail contacts through [fol. 286] postcards, letters, and broadsides. It is distributed by the company for the dealer over his name. The dealer spends no time in the preparation or handling of such material. Another form of such advertising is tire covers on which the dealer's name and address are

stamped. Imprints showing the dealer's name and address for use in newspaper advertising are furnished free by the company. The company-owned stations pay in full for all direct and other forms of advertising such as tire covers, postcards, letters, broadsides, and calendars.

The company also supplies the dealer, free of charge, a large sign mounted on a pole, which identifies the station as one servicing vehicles with the company's products, and with metal signs to be placed upon the premises to advertise the company's products and services separately. The company-owned station is charged actual cost for these advertising signs.

The company also has painted the places of business of the dealers, without expense to the dealers, in the same colors used at its own service stations so that, to the casual eye, the dealer station has much the same appearance as the company-operated station. This practice was discontinued under the provisions of the N. R. A. Oil Code. The company-owned station is charged with the full cost of painting the premises.

The company furnishes marketing information and sales helps to its dealers by means of moving pictures and sales meetings. It uses its own service stations as laboratories in the development of sales tactics for increasing retail business, and then passes such knowledge on to all agency and individual dealers for the improvement of their busi-
[fol. 287] ness. In addition to receiving sales information at meetings, dealers are coached directly by company salesmen, and they are offered the opportunity of spending some of their time in company-operated stations to acquaint them with the company's method of handling its products and of rendering service to the motoring public.

It is agreeable that the plaintiff has expended large sums of money in the several states where it transacts business, particularly so in the State of West Virginia, in advertising the aforesaid petroleum products refined, made, and manufactured by it, and in creating and establishing the patronage and good will of the motoring public. It has also expended large sums of money in said state in the purchase of real estate for, and in building thereon, its aforesaid warehouses or bulk stations and its filling stations. It has also expended large sums of money in said state in the purchase of tank wagons and other motor

vehicles used in the distribution of its aforesaid petroleum products. It has also spent years and expended large sums of money in creating and training an experienced and efficient personnel and organization for carrying on its business in the State of West Virginia. Plaintiff has certain well-known and established trade marks or trade names for its aforesaid petroleum products, and the several brands thereof, has adopted and has well-established particular colors and decorative schemes for its equipment, and the equipment where said products are sold, and has adopted and established certain designs and symbols, words and phrases, which are now well known to the motoring public.

The plaintiff makes and distributes in all four grades and brands of motor fuel, two of which are in general use [fol. 288] throughout the state, and several grades of motor lubricants, all of which grades of fuel and lubricants are well known to the trade and the motoring public, and each of which is of uniform quality, so that the fuel or oil sold in one section of the state under a particular brand or trade name is of the same grade and identical quality with that sold in other sections.

It is agreed that officers of the respective companies named below, engaged in the distribution of motor fuels and oils, if called as witnesses herein, would testify substantially that companies so engaged distribute such products through some or all of the various types of outlets commonly known as company-owned and/or -operated service stations, leased and agency service stations, authorized dealer service stations, contract service stations, individual-dealer stations not operating under any form of contract, license or agency agreements; that many of said companies operate in many states of the union through stations and outlets of the types indicated; that all the various types of outlets are supplied from bulk distributing plants maintained by each of said companies; that the respective products of said companies are designated by distinctive trade-marks and trade names; that the products of said companies distributed to individual-dealer stations are of the same quality, and bear the same brands as those handled at the various other types of service stations; that each of said companies furnishes individual-dealer stations handling their respective products certain permanent dis-

plays, advertising and identification signs, special advertising material, maps, banners, streamers, etc., uniform with or similar to those used in company stations and other stations of the types indicated above without any direct cost to such individual dealers; that all dealers of each of [fol. 289] said companies are encouraged to use the uniform signs and color schemes adopted by the companies for use in and about their own service stations; that each of said companies makes use of general advertising media which are addressed to the motoring public without drawing any distinction between the types of outlets handling their products, and which in many cases specifically direct the consumer's attention to all the stations handling such products, including individual-dealer stations; that prior to the recent adoption of a code of fair competition under the National Recovery Act said companies, except as hereinabove stated, made loans of vending and storage equipment without any charge therefor to their respective individual-dealer stations, which equipment is of uniform design, color, and manufacture with the equipment installed at other types of stations of the companies: that the said companies maintained said loaned equipment in repair at company expense, and painted the exterior of said individual-dealer stations, including said equipment, in accordance with the uniform color scheme prevailing at the other types of stations distributing the products of said companies; that the Elk Refining Company furnished loan equipment only to its dealers under contract commitment for products; that the Viking Distributing Company furnished its equipment at a nominal rental under a lease thereof; that there is little variation by reason of any particular form of operation of stations in the operating expenses, including utility charges, supplies, taxes, and labor, or in the relation of man-hours to gross revenue, at individually operated and other stations similarly situated with respect to location and possessing comparable physical characteristics; that there is no reduction of utility [fol. 290] rates to any of said companies upon the basis of the number of stations operated; that all of said companies have a form of training for the individual dealers handling their respective products, consisting of instruction, in meeting and serving the motoring public, and in detailed general operation of the station, and through representa-

tives of the said companies and through distributed literature such individual dealers are actively encouraged to maintain their stations in the same manner as the other stations of the said companies. Distributing companies referred to in this paragraph are as follows:

Gulf Refining Company,
Pure Oil Company,
Sinclair Refining Company,
Ashland Refining Company,
Texas Company,
Elk Refining Company,
Atlantic Refining Company,
Sterling Oil Company,
Viking Distributing Company,
Spears Brothers, Inc.,
Standard Oil Company of New Jersey.

It is further agreed that the officers of the following companies, if called as witnesses, would testify with regard to the price policies of their respective companies prevailing in the year 1932, that Spears Brothers maintained the same spread between the wholesale price of motor fuels and the retail posted price for both company and individual dealer stations; that individual dealer stations handling the products of the Texas Company purchased the same at 3¢ less than the retail posted price per gallon of motor fuels, whereas agency stations handled the same products at a cost of 2½¢ per gallon less than the retail posted price [fol. 291] and received in addition rental at the rate of 1¢ per gallon of motor fuels sold; that the Elk Refining Company billed its products to its contract and non-contract dealers pursuant to a policy which made a difference in price of ½¢ per gallon of motor fuels in favor of the contract dealers; that the Viking Distributing Company sold its products to its individual dealer stations at a wholesale price of 3½¢ less than the retail posted price per gallon of motor fuels, and to its company and contract dealer stations at 4¢ less than such retail posted price; and that the Sterling Oil Company billed its products to all types of stations at the same wholesale price of 3½¢ less than the retail posted price per gallon of motor fuels.

It is agreed that the officers and employees of the plaintiff, if called, would testify that, while the said employees

have no specific information as to the price policy of each of the other distributing companies operating in the State of West Virginia during the year 1932, they are thoroughly conversant with the existing competitive situation and general business practices in the trade, and, in the course of negotiating with potential dealers for plaintiff's products in said state, they have been informed concerning the prevalent price policies of all other distributing companies; that they are able to state, and would state, that the range in price policies reflected in the specific figures listed for the aforesaid Texas Company, Elk Refining Company, Viking Distributing Company, Sterling Oil Company, and Spears Brothers, Inc., are representative of the policies of all other companies operating in the said state; that many of said distributing companies made no differentiation in the wholesale price of products between individual-dealer stations and other stations handling their respective prod-
[fol. 292] ucts; that, as to the companies making such differentiation, the wholesale price to the individual-dealer station has been ½ cent per gallon of motor fuels more than that given to other types of stations under contract or license and not under lease providing a rental charge; and that those companies using the lease and agency agreements for dealers in their respective products generally billed such products to the agency stations at ½ cent per gallon of motor fuels more than the price to the individual-dealer stations; but the companies in addition, paid a rental for the use of the premises at the rate of 1 cent per gallon of motor fuels sold.

Competitive Situation at Wheeling

The following facts are agreed to in regard to the competitive situation existing at Wheeling, West Virginia, between the plaintiff and one of its competitors, Spears Brothers, Inc., each having eight service stations. situated in competitive territory, as herein shown. Spears Brothers, Inc., sells "Fleet Wing" gasoline.

The City of Wheeling lies in the shape of the letter "T". The leg of the "T" is the National Road, running east and west; one arm extends northward through Warwood, and the other extends southward through Benwood. Most of the service stations in Wheeling are located on these routes. Proceeding out the National Road, the plaintiff has a sta-

tion located at Fulton, and about a quarter of a mile farther out the road Spears Brothers, Inc., has its Glenwood station. About two hundred yards beyond the Glenwood station, is the plaintiff's Woods Run station, and about a mile beyond the latter Spears Brothers, Inc., has its "Packard" station. Approximately two miles beyond this station, [fol. 293] the plaintiff has its Elm Grove station, and about two hundred yards from that is the Elm Grove station of Spears Brothers, Inc.

On the route south from Wheeling toward Benwood, the plaintiff has a station at 20th and Chapline Streets, and four blocks farther on at 24th Street is the "24th Street" station of Spears Brothers, Inc. Seven blocks from this is the plaintiff's station at 33rd and Eoff Streets and farther on at 48th Street is the "48th Street" station of Spears Brothers, Inc. Still farther on is the plaintiff's station at Benwood.

On the road extending north from Wheeling, the plaintiff has a station at Warwood, while about two blocks beyond Spears Brothers, Inc., has its "Warwood" station.

Within the city of Wheeling itself, Spears Brothers, Inc., has two stations—one at 10th Street, and one at 14th Street. On the island adjacent to Wheeling, at Front and Zane Streets, the plaintiff has a station.

The following statement shows the gallonage and gross retail sales at these respective stations for the year 1932:

[fol. 294] Standard Oil Company of New Jersey

Wheeling Stations

Station	Gallons motor fuel	Sales value
(1) Fulton	109,604	$20,622
(2) Woods Run	126,950	25,855
(3) Elm Grove	58,358	10,921
(4) 20th and Chapline	116,799	22,663
(5) 33rd Street	95,155	18,729
(6) Benwood	66,504	9,977
(7) Warwood	43,059	7,458
(8) Front and Zane	192,491	37,703
	808,920	$153,923
Chain store tax per station		$239.43
Chain store tax on above 8 stations		$1,915.44

Spears Brothers, Inc.

Wheeling Stations

Station	Gallons motor fuel	Sales value
(1) Glenwood	203,494	$42,224
(2) Packard	131,871	30,472
(3) Elm Grove	96,083	18,905
(4) 24th Street	171,702	30,739
(5) 48th Street	100,727	19,009
(6) Warwood	151,842	28,853
(7) 10th Street	108,713	20,982
(8) 14th Street	99,891	17,359
	1,064,323	$208,543

Chain Store tax per station	7.28
Chain Store tax on above 8 stations	58.24
Net profit on 8 stations for 1932	$14,686.09

[fol. 295] Maynard Service Stations, Inc.

It is agreed that Maryland Service Stations, Inc., owned and operated in 1932 one bulk plant and five retail service stations in or adjacent to the City of Williamson, in Mingo County, West Virginia, all of which were located upon lands leased by it and the improvements thereon were constructed by the company.

The company purchases its supplies in the open market. Its sales of gasoline at its retail stations amounted to 509,465 gallons in 1932, and its sales of oil to 7,597.5 gallons. It sold at wholesale in the same year 311,091 gallons of gasoline and 4,452 gallons of oil. It employed one man in its wholesale business, who worked 3,744 hours at a cost of $1,080 and ten men in the retail business, who worked 37,440 hours at a cost of $10,064.74.

The results of operation of the company for the year 1932 were as follows:

Sales, gasoline, oil, grease and greasing services		$165,808.32
Purchase price of products	124,970.84	
Rent	11,425.25	

Salaries	11,144.74	
Other operating expenses, including depreciation	9,577.55	
		157,118.38
Net profit		8,689.94

Defiance Service Station, Gauley Bridge, W. Va.

The above station is individually-owned and operated, and sells three different brands of motor fuel, including [fol. 296] those of the plaintiff. In the year ending February 28, 1933, it sold approximately 31,728 gallons of Standard motor fuels. In the same year, its total sales and the results of operations at the station were as follows:

Gasoline sales, 73,114 gallons		$14,620.55
Oil and greases, 1,000 gallons		1,214.19
Total sales		15,834.74
Purchase price of gasoline	12,417.33	
Purchase price of oils and greases	498.25	
		12,915.58
Gross profits from sales		$2,919.16
Operating expenses:		
Salary and wages	860.00	
Rent on service station	540.00	
Light, water, and gas	342.78	
Taxes	91.33	
Miscellaneous expense	203.48	
		2,037.59
Net profit		881.57

J. A. Blake, Scarbro, W. Va.

The above individual owns and operates a service station at Scarbro, West Virginia. In the year 1932 he operated eight gasoline pumps at this point, handling the motor fuels of Elk Refining Company, American Oil Company, Pure

Oil Company, and Texas Company. He handled 119,910 gallons of motor fuel in that year, and his gross sales amounted to $30,611. Under a contract made in February, 1933, he now handles exclusively the products of Ashland Refining Company.

Lane's Garage, Belle, W. Va.

The above garage operated an individually-owned service station during the year 1932, and it sold in that year [fol. 297] 34,566 gallons of motor fuels, including those of the plaintiff. Its sales and operating results for the year 1931 were as follows:

Sales of gasoline, 50,090 gallons, profit 3c		$1,502.70
Sales of motor oil, 1,190 gallons profit 50c		595.00
Gross profit from sales		$2,097.70
Operating expenses:		
Salaries and wages	$680.00	
Electric lights	147.00	
Water	60.50	
Gas	44.95	
Net profit		$1,165.25

Park-Your-Car Company

Elk Refining Company

The Park-Your-Car Company operates a service station at Lee and Dickinson Streets, Charleston, West Virginia (a store not owned by the company occupying the corner). On the Lee Street side, the company sells petroleum products of the Ashland Refining Company, for which it acts as agent; and on the Dickinson Street side it sells products of the plaintiff, for which it also acts as agent.

The Elk Refining Company operates a service station on Dickinson Street, approximately one-half a block from the above station.

The total sales of motor fuel in gallons, by the respective companies at the above locations for the months of April to November, 1933, inclusive, with the gross revenue from said stations excluding gallonage taxes (the revenues of

[fol. 298] Park-Your-Car Company being allocated between the Ashland Refining Company and Standard Oil Company on the basis of gallonage sold), and the respective chain store taxes paid, are as follows:

Park-Your-Car Co.:

	Gallonage	Revenue	Tax
Standard	87,554	$13,891.78	$239.45
Ashland	34,030	5,400.52	133.89
Elk Refining Co.	67,289	9,771.21	18.32

National Merchandising Chains in West Virginia

It is agreed that the following named merchandise chain stores operated the respective number of stores in the State of West Virginia shown in the following table, that the gross revenues of such stores for the years 1931 and 1932 were as shown in said table, according to the reports of sales made to the State Tax Commissioner under the gross sales tax law of the state, and that the amount of chain store tax assessed against each of said stores under House Bill No. 12 is as shown in said table, as follows:

[fol. 299]

	No. of stores in W. Va.	Gross revenue W. Va. 1931	Average gross revenue per store W. Va. 1931	Gross revenue W. Va. 1932	Average gross revenue per store W. Va. 1932	Chain store tax 1933	Average chain store tax 1933
Louis K. Liggett Co	1	$106,538.00	$106,538.00	$97,619.00	$97,619.00	$2.50	$2.50
Whelan Drug Co	1	.....	.....	93,312.00	93,312.00	2.50	2.50
Kay Jewelry Co	2	162,438.52	81,219.26	116,717.18	58,358.59	8.00	4.00
Sears, Roebuck & Co	4	630,800.00	157,702.00	562,861.00	140,715.00	19.00	4.75
G. R. Kinney Co	7	278,722.51	39,817.50	235,824.83	33,689.25	45.50	6.50
Montgomery Ward & Co	7	935,976.00	133,710.00	1,058,083.00	151,154.00	45.50	6.50
O. J. Morrison Stores	11	2,042,236.00	185,657.00	1,523,033.00	138,457.00	97.50	8.86
S. S. Kresge Co	12	1,998,880.00	166,566.00	1,685,141.00	140,428.00	118.00	9.83
F. W. Woolworth Co	21	2,203,859.44	104,945.00	1,778,671.00	84,698.00	367.50	17.50
Kroger Grocery & Baking Co	94	6,099,555.00	63,718.00	5,499,343.00	58,503.00	12,469.00	132.64
Great A. & P. Tea Co	198	14,260,559.00	72,023.00	12,455,017.00	63,400.00	38,521.00	194.55

[fol. 300] It is agreed that all the above-named merchandise systems, except the Kay Jewelry Company and O. J. Morrison Stores, come within the designation of "national chains" as adopted by the Bureau of the Census, United States Department of Commerce, and that the said national chains operate many stores throughout the United States.

Five Companies in Highest Tax Bracket

It is agreed that the dates of establishing the several classes of stations by the following named companies were as follows:

Company	Date of first establishment Bulk plant	Company service station	Contract outlet
Sinclair Refining Co...	February, 1929	.....	October, 1929
Ashland Refining Co...	July, 1931	January, 1932	April, 1930
Pure Oil Co.....	September, 1919	April, 1923	February1923
Gulf Refining Co.....	July, 1930	August, 1930	August, 1930
Standard Oil Co.....	December, 1894	November, 1922	February1930

Taxes Paid by Distributors of Petroleum Products

It is agreed that the amounts of gross sales taxes paid to the State of West Virginia by the oil industry for the fiscal years 1927 to 1933, inclusive, as well as the total gross sales taxes collected for said years, and the amounts of the gasoline taxes collected for said years, are correctly shown in the following table but the defendant does not agree that the gasoline gallonage taxes are assessed against or paid by the company distributing petroleum products:

(See Table Inserted fol. 301.)

[fol. 301]

Gross Sales and Gasoline Tax Receipts

State of West Virginia—for Specified Fiscal Years

	Year ended June 30, 1927	1928	1929	1930	1931	1932	1933
1. Gross sales tax receipts, Class No. 216 refineries of petroleum gasoline	$39,337.24	$39,371.57	$48,442.27	$47,600.31	$36,878.66	$31,115.76	$22,770.82
2. Gross sales tax receipts, Class No. 338, retail sales oil and gasoline products, filling stations	7,794.19	9,085.25	10,736.41	13,304.14	10,633.05	8,533.02	6,052.45
3. Gross sales tax receipts, Class No. 426, wholesale gasoline, oil, and petroleum	5,089.50	5,904.96	5,199.78	5,702.29	5,469.38	5,365.91	6,172.73
Total gross sales tax receipts, oil industry*	52,220.93	54,361.78	64,378.46	66,606.74	52,981.09	45,014.69	34,996.00
Total gross sales tax receipts, all classes of business and industry	4,076,143.19	3,805,078.02	3,656,632.31	3,704,730.75	3,065,010.21	2,327,710.81	1,604,653.39
4. Gasoline gallonage tax receipts (including penalties)	3,103,862.77	4,021,854.49	4,465,129.47	5,154,598.32	5,615,469.43	5,489,867.17	4,826,635.68
5. Gasoline dealers license tax receipts, (including penalties)	29,078.63	7,387.50	6,820.00	6,891.85	6,982.50	7,800.25	5,792.00
Total gasoline tax receipts	3,132,942.40	4,029,241.99	4,471,949.47	5,161,490.17	5,622,451.93	5,497,667.42	4,832,427.68

* Exclusive of Class No. 103, oil and gas production, $311,296.67 in 1932.

NOTE: All data from biennial reports, State Tax Commissioner of West Virginia.

Gasoline gallonage tax receipts (including penalties) for fiscal year ended June 30, 1933, before deducting refunds, $5,076,863.98.

[fol. 302] It is agreed that the gross sales taxes and gasoline gallonage taxes paid by the following named companies engaged in the refining and marketing of petroleum products, for the fiscal year ending June 30, 1933, are correctly shown in the following table:

	Gasoline gallonage	Gross sales license tax		
	Tax year	Year ended June 30, 1933		
	June 30, 1933	Refining	Retail	Wholesale
Ashland Refining Co...	$85,862.04	$443.38	$66.63	$105.82
Atlantic Refining Co...	75,277.45	.....	1.04	120.60
Dinsmoor & Co.....	2,246.68	No. Tax	No Tax	No Tax
Freedom Oil Works Co.	44,393.95	.....	.....	58.76
Gulf Refining Co.....	653,072.92	.....	738.14	1,106.79
National Refining Co...	6,257.12	.....	.....	7.80
Sterling Oil Co.....	22,942.40	.....	443.09	420.18
Sinclair Refining Co....	99,381.66	.....	.....	49.84
Southern Oil Co.....	1,086.92	5.13	134.94	.....
Standard Oil Co.....	1,739,346.04	10,965.91	1,330.07	867.41
Viking Distributing Co.	90,943.80	.....	313.98	169.75
American Oil Co.....	536,109.14	.....	460.91	781.74
Bell Oil Products Co...	10,554.96	.....	263.53	121.75
Elk Refining Co.....	181,440.36	3,213.91	.....	.....
Federal Oil Co.....	621.20	No Tax	No Tax	No Tax
Maynard's Service Co., (Tax paid by seller)..		.....	180.00	45.00
Pure Oil Co.....	401,281.10	4,045.33	257.14	82.79
Shell Petroleum Corp...	25,259.28	.....	47.92	26.09
Spears Bros., Inc.....	67,631.32	.....	653.84	25.00
South Penn Oil Co.....	44,093.64	429.56	512.63	261.25
The Texas Co.....	163,036.06	.....	.....	190.52
	$4,250,838.04	$19,103.22	$5,403.86	$4,441.09

That the amount of gasoline gallonage tax paid during the fiscal year ending June 30, 1933, on gallonage sold through company-operated service stations leased outlets, and vending-privilege outlets of the plaintiff was $1,160,770.89.

State Revenues—Classified

It is agreed that the amounts of state revenue for the various funds and for the fiscal years 1927 to 1933, inclusive, are correctly shown by the following table:

[fol. 303]

State Revenue Collections
West Virginia
For Specified Fiscal Years (Ending June 30th)

	1927	1928	1929	1930	1931	1932	1933
State general revenue including direct levy on property, corporate charter tax, collateral inheritance tax, gross sales tax, insurance and certificate of authority tax, etc.	$8,938,835.26	$8,284,343.14	$8,916,043.04	$8,308,036.71	$7,890,159.43	$6,571,878.83	$5,288,161.87
State special revenue including fees from pay patients at institutions, game and fish license fees, state school fees, etc	2,768,274.42	2,718,906.44	2,926,147.45	2,502,983.39	2,221,991.86	2,526,454.60	2,058,856.85
State Capitol Building Fund:							
Special revenue authorized for five years (1929–1933) direct levy of five cents on property	.....	.....	.....	712,072.27	981,963.13	861,755.07	707,316.97
Virginia debt—sinking fund, direct levy of four cents on property	767,773.25	765,640.01	835,513.60	676,087.54	776,162.51	682,263.15	558,232.54
General school fund	1,113,622.23	1,017,072.77	1,180,085.04	1,006,982.58	1,076,581.35	917,214.48	942,234.27
State Road Fund:							
1. Motor vehicle and operator's license fees	3,958,234.73	4,178,197.64	4,479,265.42	4,779,909.73	4,487,136.80	4,120,542.21	3,648,500.08
2. Gasoline gallonage and license tax receipts	3,132,941.40	4,029,241.99	4,471,949.47	5,161,490.17	5,622,451.93	5,497,667.42	4,832,427.68
Sub-total motor vehicle and gasoline tax receipts	7,091,176.13	8,207,439.63	8,951,214.89	9,941,399.90	10,109,588.73	9,618,209.63	8,480,927.76
Total state revenues	20,679,681.29	20,993,401.99	22,809,004.02	23,207,562.39	23,506,447.01	21,177,775.76	18,035,730.26

[fol. 304] Gallonage Taxes and Gross Sales Taxes

It is stipulated that the plaintiff paid to the State of West Virginia and to the Federal Government the various taxes listed below in the years named:

That the several amounts paid to the said state on account of gallonage tax under the provisions of section 3, article 14, chapter 11, Code of West Virginia, for the years 1928 to 1932, inclusive, were as follows:

	1928	1929	1930	1931	1932
January	94,581.54	103,435.35	127,663.01	136,704.75	130,170.96
February	92,968.66	97,261.82	123,374.69	133,167.56	132,561.08
March	129,231.24	135,771.51	156,559.56	145,764.79	135,738.92
April	160,844.00	184,703.34	211,426.51	189,732.53	166,796.33
May	185,259.40	206,810.12	237,856.90	217,488.83	175,210.57
June	188,909.42	225,358.76	240,867.70	232,459.46	185,782.04
July	207,532.36	248,394.16	272,326.28	253,371.67	168,527.58
August	222,238.70	256,616.14	270,050.80	250,084.88	200,865.98
September	203,822.76	247,728.39	270,887.04	245,905.80	182,957.91
October	204,187.38	245,283.89	251,755.11	226,772.35	180,523.02
November	170,052.46	199,750.42	210,033.40	197,875.99	159,978.63
December	154,642.80	163,184.68	169,896.15	172,488.66	136,974.09
Total	$2,014,270.72	2,314,298.58	2,542,697.15	2,401,817.27	1,956,087.11

[fol. 305] The plaintiff contends that the state gasoline gallonage taxes were imposed upon it under the terms of said statute, whereas the defendant contends that said taxes were not imposed upon the plaintiff but were imposed upon the consumers of gasoline, and that in transmitting the same to the state the plaintiff acted in the capacity of a collecting agency for and on behalf of the state.

That the several amounts paid to the Federal Government by the plaintiff for gallonage tax on gasoline and lubricating oil for the months of June to December, 1932, inclusive, are as follows:

	Gasoline	Lubricating oil
June	11,612.64	443.37
July	38,790.71	4,236.56
August	44,614.55	5,740.84
September	40,959.04	6,600.53
October	40,740.82	9,281.84
November	36,295.34	6,946.63
December	31,088.21	6,783.21
Total	$244,101.31	$40,032.92

That the other taxes paid by the plaintiff to the State of West Virginia for said years, were as follows:

1928	$81,216.13
1929	81,679.41
1930	92,345.65
1931	89,043.78
1932	81,066.58

The following table shows the amount of gross sales taxes paid by the plaintiff for the fiscal years ending June 30, 1930, 1931 and 1932, and also the amounts which would have been payable upon the same amount of business for [fol. 306] said years if the present rates, prescribed by the Act passed in 1933, had been in effect for said years, respectively:

	Tax paid	Tax under new rates	Difference	Per cent of increase
1930	$20,583.71	$38,998.78	$18,415.07	89.464
1931	18,751.58	34,011.79	15,260.21	81.381
1932	14,587.48	25,709.70	11,122.22	76.245

It is agreed that the total sales, in gallons of motor fuel, in the State of West Virginia for the years 1928 to 1932, inclusive, with the proportion of such sales made by the plaintiff, are correctly shown in the following table:

Year	Consumption of motor fuel in state	Standard Oil Co. sales in state	Standard Oil Co. per cent of total
1928	111,533,600	50,552,045	45.32
1929	126,480,443	59,110,514	46.73
1930	140,433,156	64,007,589	45.58
1931	143,782,808	60,483,106	42.07
1932	129,229,137	49,216,792	38.08

The gallonage of motor fuels sold by the plaintiff in the years 1931 and 1932 through its own service stations and its agency stations respectively, is as follows:

	1931	1932
Company-owned stations	13,612,295	10,920,053
Agency stations	20,505,057	20,987,230

[fol. 307] Operations of Plaintiff and Affiliated Companies

It is agreed that the accountants and officers of the company, if called as witnesses, would testify that the sales and net earnings of the plaintiff at all stations in West Virginia for the years 1931, 1932 and first six months of 1933, are correctly shown upon the following table, but as to the net earnings shown thereon, it is stipulated only that said witnesses would testify that the respective amounts shown in the statement are accurately taken from the books of the company, and are calculated according to proper accounting principles, and according to the practice of the company:

[[fol. 308]]

Summary of Sales and Net Earnings at All Stations in West Virginia for Years 1931, 1932, and First Six Months, 1933

	1931	1932	6 Mos. 1933
Number bulk plants	78	63	54
Number company and agency stations	911	1,046	949
Gallonage petroleum products	35,052,489.7	32,643,586.8	12,848,427.4
Revenue from petroleum products	$6,380,780.42	$6,093,701.68	$2,035,414.83
Revenue from other products	243,060.34*	166,495.18*	65,246.99*
Revenue from services	81,502.82	58,816.12	23,920.60
Total gross revenue	6,705,343.58	6,319,012.96	2,124,582.42
Average gross revenue per station, bulk plants excluded	7,360.42	6,041.12	2,238.76
Average gross revenue per station, bulk plants included	6,779.92	5,697.94	2,118.23
Total net earnings	491,250.88	259,797.60	89,581.45**
Average net earnings per station, bulk plants excluded	539.24	248.37	94.39**
Average net earnings per station, bulk plants included	496.71	234.26	89.31**
Chain store tax computed on number of stations	236,666.50	266,726.50	240,173.50
Average chain store tax (computed)	239.29	240.51	239.45

* Does not include sales of tires and other products to leased and vending privilege outlets. See below.

**Red figures—loss.

Tires	$127,877.65	$97,280.45	$43,806.07
Alcohol, estimated	3,100.00	4,250.00	
Batteries, estimated		5,227.37	1,653.03
Accessories, estimated	450.00	2,931.06	1,483.14

[fol. 309] It is further agreed that the accountants and officers of the plaintiff company, if called as witnesses herein, would testify that the plat or graph herewith filed as part of this stipulation marked for identification Exhibit No. 6, "Comparative Chart", shows by graphic lines, and with substantial accuracy, the following data with respect to the motor fuel business of the plaintiff company for the years 1928 to 1933, inclusive, as shown by books and records of the company, and otherwise as indicated below:

(1) Service Station prices at Parkersburg, West Virginia, (including gallonage tax);

(2) Service Station prices at Parkersburg, West Virginia, (excluding gallonage tax);

(3) Refinery billing prices at Parkersburg, West Virginia;

(4) Refinery marketing prices for Western Pennsylvania territory (including West Virginia) obtained from the Oil Price Handbook published by the National Petroleum News, Cleveland, Ohio;

(5) Total taxes paid by plaintiff per gallon of motor fuel;

(6) The total consumption of motor fuel in the State of West Virginia (shown on separate scale).

(See Chart Inserted.)

(Here follows chart, side folio 310)

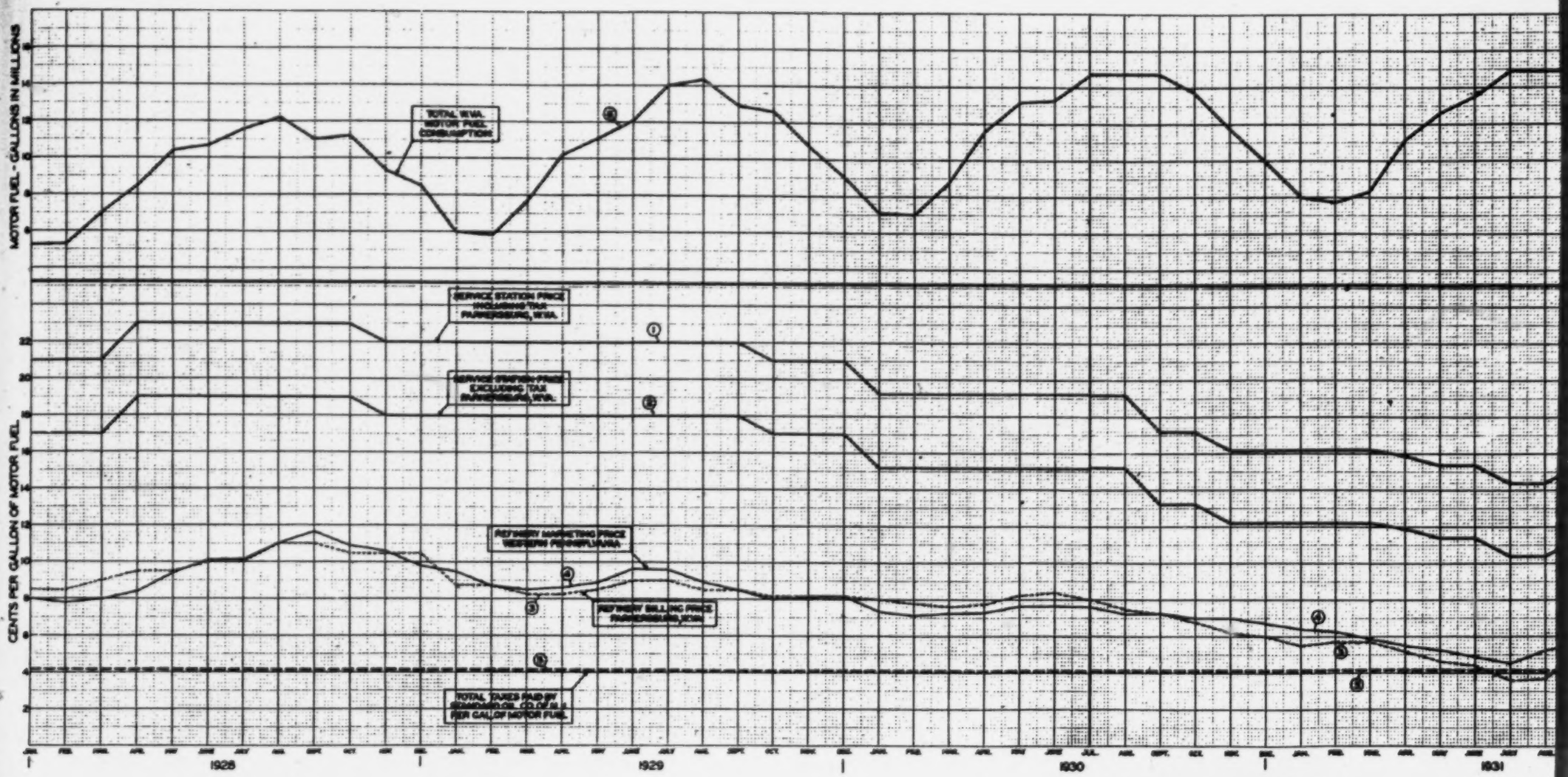
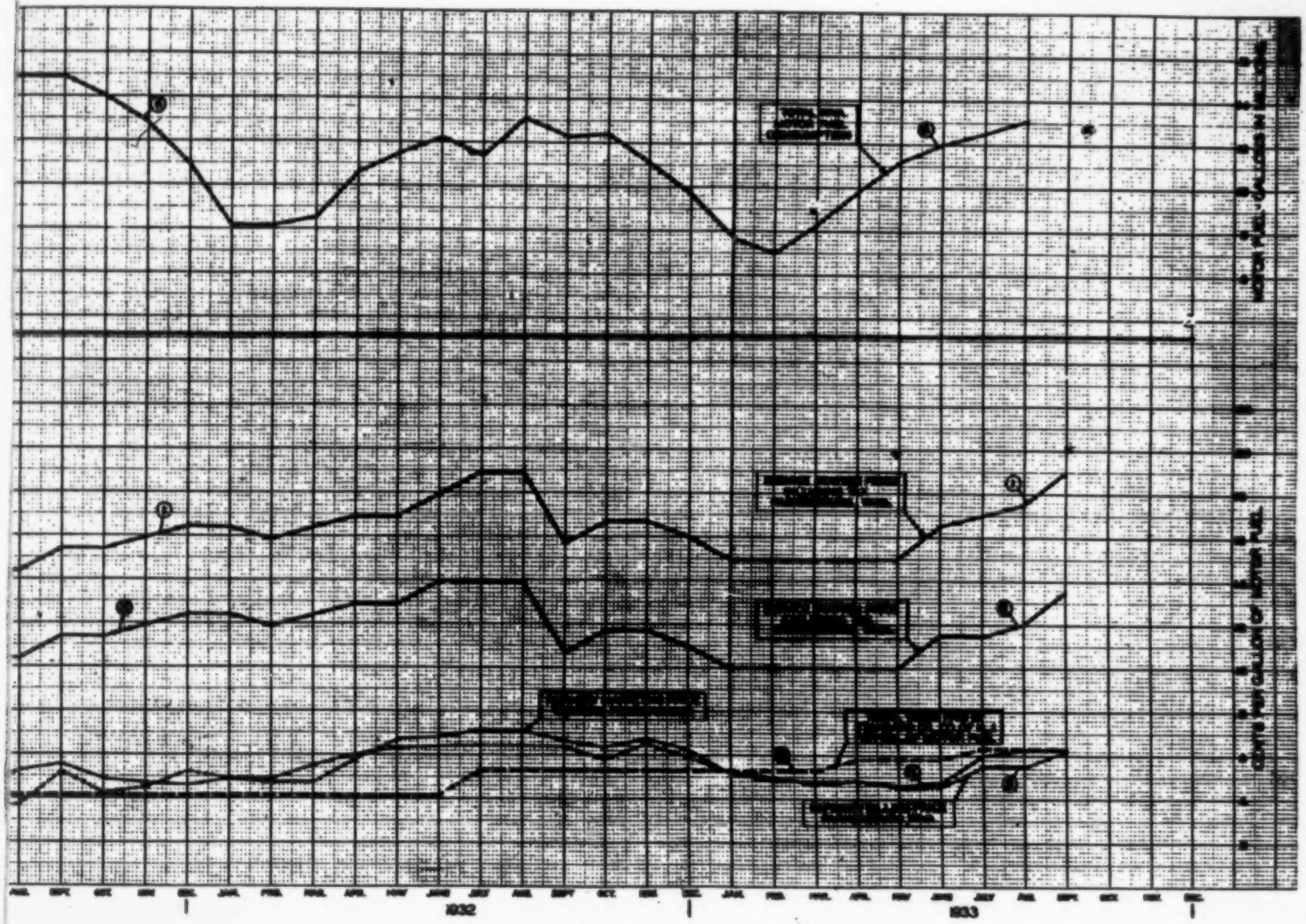


EXHIBIT No.6

COMPARATIVE CHART

SHOWING

① —— SERVICE STATION PRICE, PARKERSBURG, W.VA. (INCLUDING GALLONAGE TAX)
② —— SERVICE STATION PRICE, PARKERSBURG, W.VA. (EXCLUDING GALLONAGE TAX)
③ ----- REFINERY BILLING PRICE, PARKERSBURG, W.VA.
④ —— REFINERY MARKETING PRICE, WESTERN PENNSYLVANIA REGION
⑤ – – TOTAL TAXES PAID BY STANDARD OIL CO. OF N.J. PER GAL. OF MOTOR FUEL
⑥ —— TOTAL CONSUMPTION OF MOTOR FUEL IN WEST VIRGINIA.


1932
1933

[fol. 311] Business of Affiliated Companies

(a) Companies affiliated with the plaintiff produce approximately 308,000 barrels of crude petroleum annually in the State of West Virginia, largely from the territory within 100 miles of the Parkersburg refinery of plaintiff, which crude oil is sufficient to produce approximately 6,400,000 gallons of commercial motor fuel, none of which petroleum is refined in the State of West Virginia. This petroleum is transported by pipe line to the plaintiff's refineries in New Jersey and very largely used for the making of lubricating oil rather than motor fuels. Said 308,000 barrels are a part of 1,300,000 barrels of crude oil produced in New York, Pennsylvania and West Virginia and purchased by the plaintiff and affiliates. It is estimated that 400,000 of said 1,300,000 barrels are produced in West Virginia.

The crude petroleum refined at Parkersburg by the plaintiff to manufacture motor fuels and oils for sale in the State of West Virginia is produced in the mid-continent area, and is brought to the Parkersburg refinery by pipe lines.

Companies affiliated with the plaintiff produce natural gas in the State of West Virginia from which, in 1932, approximately 18,000,000 gallons of absorption gasoline were extracted at plants located in West Virginia and elsewhere. The gasoline thus manufactured, unblended, is not suitable for use as fuel in motor vehicles, but practically all of it is later blended and used for motor fuel. It is sold for blending with gasoline produced at refineries. The Parkersburg refinery of the plaintiff does not use any absorption gasoline for blending with its product. During 1932, the absorption gasoline thus manufactured has been sold [fol. 312] through brokers in any available market, to the Imperial Oil, Ltd., to the Colonial Beacon Oil Company, both of which are Standard affiliates and to the plaintiff for use at its Baltimore refinery. Of the 18,000,000 gallons produced in 1932, approximately 9,500,000 gallons were sold through brokers, and 8,500,000 gallons were sold to the Imperial and Colonial companies and to the plaintiff.

(b) The prices at which petroleum is sold to the plaintiff's refinery at Parkersburg, West Virginia, are ascertained in the manner elsewhere herein set forth and do not purport to be the full, actual cost of the production of such

petroleum by the plaintiff's affiliates and no showing of such actual cost to any affiliate of the plaitniff in the production and transportation of petroleum delivered to the plaintiff is made in this stipulation.

(c) The posted price at which motor fuels and motor lubricants are sold at the plaintiff's stations and agency stations in the State of West Virginia are determined from time to time at the plaintiff's principal office in the City of New York and are communicated to the plaintiff's branch office in Charleston, West Virginia, the branch office in Baltimore, Maryland, and the branch office in Richmond, Virginia, for posting in the State of West Virginia, in the respective territories managed by said branch offices. The posted prices of motor lubricants do not fluctuate greatly. The posted prices of motor fuels are ordinarily changed from time to time throughout the year, the changes ranging from one-half cent to one cent per gallon. During the year 1932 there were about eight changes, and in 1933 there have been about five changes, including an increase of one and one-half cents during the month of May, 1933.

[fol. 313] (d) It is stipulated and agreed that if the witnesses for the plaintiff elsewhere in this stipulation designated competent witnesses to testify concerning the financial affairs of the plaintiff and its affiliates, and the witnesses who, it is stipulated, if placed upon the stand therefor, would testify to the financial transactions of the plaintiff as hereinbefore set forth in this stipulation, were, on cross-examination by the defendant, asked for information concerning all of the financial transactions of the plaintiff and its subsidiary and affiliated companies as referred to in Paragraph XI-A of the answer as amended, they would answer that Standard Oil Company (incorporated in New Jersey) is solely a holding company and owns all of the stock of or an interest in a number of producing, manufacturing, transporting, and marketing companies engaged in the petroleum and natural gas business and collateral enterprises; that one or more of these companies is engaged in some phase of the petroleum business in the United States, Canada, England, France, Germany, Italy, Poland, Austria, Brazil, Argentina, Mexico, Norway, Sweden, Dutch East Indies, and other countries; that Carter Oil Company is a subsidiary of the plaintiff which owns all

of the capital stock of the Carter Oil Company; that the losses of the Carter Oil Company, as shown by the books of said company for the years 1931 and 1932, and the first six months of 1933, upon the oil sold and delivered by it to the plaintiff's refinery at Parkersburg (ascertained by determining the company's loss per barrel of all oil handled by it and applying the same to the gallonage so sold and delivered), were as follows:

1931	$244,634.21
1932	17,285.25
1933 (6 mos.)	145,440.88
	$407,360.34

[fol. 314] That the profits on each barrel of oil transported accruing to the plaintiff or its affiliates through stock ownership in the Oklahoma Pipeline Company and Ajax Pipeline Company, multiplied by the number of barrels of oil transported by them, respecitvely, to the Parkersburg refinery, for the periods aforesaid, were as follows:

	Oklahoma Pipeline Co.	Ajax Pipeline Co.
1931	$30,882.82	$94,227.60
1932	22,926.31	75,435.23
1933 (6 mos.)	4,522.32	28,959.82
	$61,232.80	$198,622.65

That a subsidiary of the Standard Oil Company (New Jersey) owns approximately twenty per cent of the stock of Atlas Supply Company; during the year 1932 the gross revenue of the plaintiff from the sale of tires and tubes sold by the Atlas Supply Company to the plaintiff during the year 1932 was $299,084.85; that for the year 1932 said subsidiary received certain dividends upon its stock holdings in the Atlas Supply Company, the portion of which dividends derived from sales in the State of West Virginia amounted to approximately $11,323.71.

That said witnesses, when asked further with respect to the matters alleged by the defendant in Paragraph XI-A of his answer as amended, would decline and refuse to make further answers to the inquiries contained in said amended answer concerning the relations between the Standard Oil Company (a New Jersey corporation) and any of its other subsidiaries or affiliates, other than is set [fol. 315] out in this stipulation, and would decline and refuse to give any information concerning the profits and/or losses of such other subsidiaries and affiliates, other than as herein set out, and would assign as reasons for such declining and refusal that in their opinion and that of counsel for the plaintiff such information is immaterial to the matters involved in this cause; that under the interpretation of the Act by the defendant, the tax thereunder is imposed upon "stores", and the license required is for the operation of "stores", and the plaintiff and its counsel contend that any information concerning matters outside of the marketing transactions of the plaintiff are therefore immaterial to the issues raised herein; that the details of other businesses and transactions carried on by the plaintiff and/or its affiliates, and profits or losses incurred therein, are irrelevant to a consideration of the effect of the tax in question upon the marketing operations of the plaintiff. The plaintiff insists that it has given, and there is elsewhere contained in this stipulation, all information material and relevant to its West Virginia business. The defendant claims that he is entitled to the evidence required by paragraph XI-A of the answer as amended.

The following letters (a) addressed to counsel for the plaintiff by the Attorney General of West Virginia, and (b) addressed to counsel for the plaintiff by chief counsel for the plaintiff, at its New York office, referring to the requests made in the letter of the Attorney General, show the requests made of the plaintiff for information upon the subjects mentioned in the preceding paragraph, and the response made thereto:

[fol. 316] State of West Virginia

Office of the Attorney General, Charleston

November 9, 1933.

Honorable H. D. Rummel, Rummel, Blagg & Stone, Security Bank & Trust Building, Charleston, West Virginia.

Re Standard Oil Company of New Jersey vs. Fred L. Fox et al.

My Dear Judge Rummel: In connection with the stipulation of facts proposed and which in some respects we have heretofore considered, inasmuch as the Standard Oil Company is attacking the chain store tax on the grounds that it is confiscatory and in an effort to substantiate such charges is exhibiting the various earnings and losses of Standard Oil Company of New Jersey, a Delaware corporation, and in view of the fact that I understand that Standard Oil Company of New Jersey, a Delaware Corporation, is merely a subsidiary of Standard Oil Company, a New Jersey corporation, and that in the Standard Oil group there are perhaps 200, more or less, various companies involved, I desire the following information for consideration and possible use in stipulation:

(1) The names of all of the Standard Oil group of companies: parent companies, subsidiary companies, and other affiliates.

[fol. 317] (2) The character of business engaged in by the various companies.

(3) The character of affiliation.

(4) The separate profits and losses of all of said companies for the years covered by the figures given in your proposed stipulation, which I believe are, 1930, 1931, 1932, and eight months of 1933.

In other words, I understand that the Standard Oil Company of New Jersey, a Delaware corporation, is not engaged in the production of petroleum, but is engaged only in the refining of petroleum products and the transportation and distribution of the refined products. We desire information on the financial history of Standard Oil Com-

pany in all its branches from the taking of leases, drilling of wells, production and transportation of the crude by pipe lines or otherwise, on through the refineries and other processes as to which you have given us information relative to the Delaware corporation.

Also, I desire to know the exact status of the Atlas Tire Company which would appear to be an affiliate or subsidiary of the Standard group.

Of course I am not sufficiently familiar with the detailed organization of the Standard Oil group to make many detailed suggestions along this line, but from one of the statements it appears that the Humble Companies are involved, and, perhaps, the Carter Oil Company, various pipe line companies, etc., as well as certain natural gasoline productions, etc.

[fol. 318] Thanking you for this information, I remain

Yours very truly, (Signed) Homer A. Holt, Attorney General.

Standard Oil Company of New Jersey, 26 Broadway, New York

November 23, 1933.

West Virginia Chain Stores Tax Case

Honorable H. D. Rummel, Charleston, West Virginia.

Dear Judge Rummel: I have the letter of November 9 from the West Virginia Attorney General to you requesting information regarding the names, business and profit and loss statements of the several companies in which the Standard Oil Company (New Jersey) owns stock.

The Standard Oil Company (New Jersey) is solely a holding company, owns all of the stock of or an interest in a number of producing manufacturing, transporting and marketing companies engaged in the petroleum and natural gas business and collateral enterprises. One or more of such companies is engaged in some phases of the petroleum business in the United States, Canada, England, France, Germany, Italy, Poland, Austria, Brazil, Argentina, Mexico, Norway, Sweden, Dutch East Indies and other countries. The profits or losses sustained by many of these companies, [fol. 319] in our opinion, will add nothing of value to the study being made of our business in West Virginia. How-

ever, the proportion of the profits or losses of the Carter Oil Company (from which crude oil processed at the Parkersburg Refinery is purchased) and the Oklahoma Pipeline Company and the Ajax Pipeline Company (operators of pipelines through which such crude oil is transported) may be of interest. We have ascertained the Carter Oil Company's loss per barrel on all crude oil it sold and multiplied the per barrel loss by the number of barrels of such oil refined at Parkersburg. We have ascertained the profits of the Oklahoma Pipeline Company on each barrel of oil transported and multiplied such per barrel profit by the number of barrels transported to the Parkersburg Refinery. We have ascertained the profits of the Ajax Pipeline Company on each barrel of oil transported and multiplied such per barrel profit by the number of barrels transported to the Parkersburg Refinery and ascertained the part of that profit inuring to the benefit of the Standard Oil Company of New Jersey through its ownership or the ownership by the Carter Oil Company of the common capital stock of the Ajax Corporation. The results are as follows:

Year	The Carter Oil Co.	Oklahoma Pipeline Co.	Ajax Pipeline Co.
1931	***244,634.21**	30,882.82	94,227.60
1932	**17,285.25**	22,926.31	75,435.23
1933 (6 mos.)	**145,440.88**	4,522.32	28,959.82
Total	**407,360.34**	61,232.80	198,622.65

(*Bold face figures—loss.)

This tabulation shows the approximate amount of the profit or loss of the companies mentioned on the sale or [fol. 320] transportation of crude oil reaching the Parkersburg Refinery.

A subsidiary of the Standard Oil Company (New Jersey) owns approximately 20% of the stock of the Atlas Supply Company (mentioned in the Attorney General's letter under the name of the Atlas Tire Company). The Atlas Supply Company is engaged in purchasing tires from manufacturers and selling such tires to its stockholders and others. You are authorized to transmit this information to the Attorney General should you desire to do so.

Yours very truly, (Signed) Edwin S. Hall.

Operating Statements Covering Marketing Activities of Gasoline Dealers Subject to Maximum Tax

This stipulation relates to the operating results from the marketing activities only, and does not refer to the production, transportation, refinery and other activities of the companies, if any.

It is stipulated that according to the applications for licenses filed with defendant pursuant to House Bill No. 112, five taxpayers operated more than 75 gasoline filling stations in the State of West Virginia in the year 1933. These five taxpayers are:

Sinclair Refining Company.
Ashland Refining Company.
Pure Oil Company.
Gulf Refining Company.
Standard Oil Company of New Jersey.

[fol. 321] Two factors determine the profits or losses from the marketing operations of said five companies in West Virginia; first, the gross operating revenue from the sale of products in the state, and, second, the expenses of operation of each company in the state. The expenses shown in the following statements of the several companies include:

(a) The refinery billing costs of products delivered to the marketing departments in the state. Such costs are not the actual production, transportation and refining costs of the respective companies for such products.

(b) Fixed costs of operation, which include taxes, depreciation of properties, overheads at bulk plants and branch establishments in the state, and general overheads and administrative costs of each company allocated to the West Virginia marketing operations.

(c) Direct operating costs in the state, which include all expense of operation, such as salaries, wages, supplies, materials, and the like.

In determining the commodity cost of products delivered to the marketing departments, the five companies do not follow an exactly uniform policy. Such commodity cost of the Standard Oil Company of New Jersey, in the period 1928-1933, and the relation of that cost to the current

market prices for the same commodity as published in the National Petroleum News, are shown in this stipulation.

Below are given certain statements purporting to show the marketing results only of the West Virginia business of the other four companies. In stipulating such operat-
[fol. 322] ing results of those companies, as shown herein (Ashland Refining Company excepted), the defendant merely agrees that if competent witnesses familiar with the books of the company relating to the marketing business of said companies in West Virginia were examined in open court, they would testify as to the book accuracy of the figures shown. Because of the absence of information concerning all of the financial transactions of each of said companies (except Ashland Refining Company) of the character referred to in Paragraph XI-A of the answer of the defendant in this cause as amended, its respective subsidiaries, affiliates, and holding companies, and as to the profits or losses incurred in the production, transportation, or other departments of the respective companies, the defendant does not stipulate that the profits and/or losses shown in said statements, whether based upon the costs as carried upon the companies' books or upon market prices published in the National Petroleum News, accurately reflect the actual profits or losses of said companies in their West Virginia business.

The following statements relative to said four companies (except Ashland Refining Company) are, therefore, stipulated subject to the above qualification.

Gulf Refining Company

The Gulf Refining Company established its first bulk plant in the State of West Virginia in July, 1930, and its first company-owned service station in August, 1930.

As of June 30, 1932, and June 30, 1933, the company owned and operated bulk plants and service stations in the state as follows:

[fol. 323]

	1932	1933
	1932	1933
Bulk Plants	20	20
Service Stations	15	15

In addition to the above, the company distributed petroleum products, as of March 8, 1933, through 744 agency or contract stations.

The gallonage taxes transmitted to the state at the rate of four cents per gallon of gasoline sold by the company in the state for the same two years, were as follows:

Fiscal year ended June 30, 1932	$567,331.08
Fiscal year ended June 30, 1933	653,072.92

The amount of gross sales taxes, or business and occupation taxes described in paragraph XI (subparagraph 2) of the bill of complaint, paid by the company upon its wholesale and retail business in the State of West Virginia for the same fiscal years, is as follows:

	1932	1933
Wholesale	$810.79	$907.75
Retail	467.38	613.37

It is agreed that proper officers of the Gulf Refining Company, if called as witnesses herein, would testify that the operating expenses of said company on account of its business done in West Virginia for the calendar year 1932 amounted to $892,307; that the total volume of gasoline sold by the company in the state for said year was 15,032,703 gallons, and the volume of other petroleum products [fol. 324] was 1,305,745 gallons. Said witnesses would further testify that the gross revenue of the company in the state for said year was $2,612,167, including gallonage taxes on motor fuel sold, and $1,976,034, excluding such taxes, of which latter amount $1,436,497 represented gross sales at service stations.

Said witnesses would further testify that the following is a correct statement of the operating results of said company for the year 1932, as shown by the books of the company:

Total Sales Exclusive of Gallonage Taxes	$1,976,034.00
Material Cost Including $217,236 Transportation (Book Figures)	1,449,724.00
Gross Profit	$526,310.00

Operating Expenses:		
Station Operating Expenses	$399,178.00	
Hauling—Co. Owned Trucks	73,494.00	
Agency & General Administrative Expenses	218,973.00	
Fixed Expenses (Including Depreciation & Taxes)	200,662.00	
Total Operating Expenses		892,307.00
Net Operating Revenue		$365,997.00*
Other Income Less Income Deductions		5,121.00
Net Income		$360,876.00*

* Red figures—Loss

Pure Oil Company

It is agreed that the Pure Oil Company owned and operated the following inumber of service stations in the [fol. 325] State of West Virginia in the respective years named:

1931	27
1932	29
1933	30

The business done at the service stations of the company above mentioned for the years 1931, 1932 and 1933 (fiscal years ending March 31st), and the results of operation, are shown in the following table:

[fol. 326]

Service Station Operations

Pure Oil Company

	1931		1932		1933	
	Total	Per sta.	Total	Per sta.	Total	Per sta
Gross sales	$362,176.22	13,413.93	310,262.04	10,698.69	309,424.33	10,314.14
Cost of sales	182,578.12	6,762.15	135,710.48	4,679.67	152,563.23	5,085.44
Gross profit	179,598.10	6,651.78	174,551.56	6,019.02	156,861.10	5,228.70
Expenses	194,649.82	7,209.75	175,968.84	6,068.89	198,132.23	6,604.41
Net loss	15,051.72	557.47	1,417.28	48.87	41,271.13	1,375.70

[fol. 327] In the year 1933, the company owned and operated six bulk plants in the state.

As of the effective date of House Bill No. 112, the Pure Oil Company supplied gasoline and other petroleum products to 115 stations operated under "lease and agency" or "lease and license" agreements with the company, similar in general form and tenor to the lease and vending privilege agreements used by the plaintiff in its business. At these stations, for the twelve months ended March 31, 1933, the motor fuel spread or gross profit amounted to 6.84 cents per gallon. The bulk wholesale tank wagon expense was 4.78 cents per gallon (including general administrative expenses), and the agents' commissions and rent amounted to 4.03 cents per gallon, leaving a net loss of 1.97 cents per gallon on each gallon handled through such lease and agency outlets. The company's billing cost of gasoline to its marketing department was approximately 5% under the prices published in the National Petroleum News for 1932.

For the fiscal year ended June 30, 1933, the company sold in West Virginia 10,032,027.5 gallons of motor fuel, and transmitted taxes thereon to the State of West Virginia amounting to $401,281.10.

Ashland Refining Company

It is agreed that the Ashland Refining Company and its affiliated corporations, under a common management, owned, operated and/or controlled the following bulk plants and service stations in the State of West Virginia, as of the effective date of House Bill No. 112, namely:

[fol. 328]

Service stations operated by company	3
Bulk plants, no sales on premises	4
Bulk plants, with sales on premises	3
Service stations operated by others under lease and agency agreements	46
Gasoline stations operated as accessory to other principal business in which the company had no interest	36
	92

The total number of such service stations owned, operated and/or controlled by the company for the calendar year 1932 was 118, and the number of its bulk plants was 7.

The gallons of petroleum products sold at said service stations for the year 1932 and for the first six months of 1933, with net loss to the company, and the net loss per station, were as follows:

	Gallons sold	Total net loss	Net loss per station
1932	2,295,537	$11,582.36	$98.15
1933 (6 months)	1,178,218	21,076.70	229.09

The Ashland Refining Company owns and operates a refinery at Leach, Kentucky, from which petroleum products are sold and distributed in several states, principally in Ohio, Kentucky and West Virginia. In addition to two subsidiaries which operate filling stations under a common management, as above stated, the following corporations are affiliated with the Ashland Refining Company in the manner set out below:

(1) Swiss Oil Corporation, of Lexington, Kentucky. Owns 95% of the common stock of Ashland Refining Company. A large producer of crude oil in Eastern Kentucky, [fol. 329] the area from which the affiliated companies obtain their supply of crude oil.

(2) Tri-State Refining Company. Substantially all stock owned by Ashland Refining Company. Owns and operates a refinery at Kenova, West Virginia, and distributes its products in same manner as Ashland Refining Company.

(3) Ashland Oil and Transportation Company. Substantially all stock owned by Ashland Refining Company. Owns and operates a pipe line in Eastern Kentucky, through which both refineries obtain crude oil.

The results of operation of the bulk company's business in the state for the year 1932 and the first six months of 1933, were as follows:

	1932	6 months 1933
Combined sales, all products	$352,255.84	$118,286.56
Refinery price of products	240,580.77	89,475.65
Gross profit	$111,675.07	$28,810.91
Less operating expense	126,701.77	54,435.45
Net Loss	$15,026.70	$25,624.54

The expenses deducted in the above table are made up of the following items:

	1932	6 months 1933
Operating:		
Managers' salaries	$24,051.62	$8,560.62
Truck salesmen's salaries	4,582.61	2,536.24
Clerical salaries	3,325.26	179.75
[fol. 330] Rent	16,641.88	6,715.04
Insurance	5,454.04	1,159.55
Depreciation	16,935.96	8,721.14
Repairs to buildings	1,815.59	781.30
Repairs to equipment	5,617.38	1,553.80
Repairs to trucks	2,158.93	586.34
Gas, oil and grease used	2,256.26	997.25
Taxes	2,338.88	1,439.76
Light, heat and water	750.70	402.51
Telephone and telegraph	690.86	357.96
Stationery and postage	202.19	148.43
Traveling expense	2,148.79	487.81
Hauling expense	8,354.20	5,445.16
Drum expense	153.93	141.68
Installation, labor	1,248.32	391.46
Installation, material	1,246.51	141.66
Warehouse expense	2,162.01	1,071.17
Miscellaneous expense	612.31	334.39
Total operating expense	$102,748.23	$42,042.02
Overhead:		
General office expense	8,488.21	4,534.72
Salesmen's salaries	5,813.65	2,459.69
Traveling expense	3,206.35	1,699.90
Total overhead expense	$17,508.21	$8,694.31
Other deductions:		
Reserve for doubtful accounts	3,220.21	3,467.36
Fire loss	3,083.64	
Miscellaneous	141.48	231.76
Total other deductions	$6,445.33	$3,699.12
Total combined expense	$126,701.77	$54,435.45

The following statement shows a comparison of the prices charged the West Virginia bulk plants by the refineries of the Ashland Refining Company and its affiliates, with the prices charged by them to other purchasers:

[fol. 331]	Per Gallon Sold 1932	1933
Average gasoline price to West Virginia bulk plants, delivered	$.07638	.05846
Less average freight	.00685	.00684
Net average price to bulk plants	.06953	.05162
Average refinery price for all gasoline sales	.06340	.04708
Average excess charge to West Virginia bulk plants	.00613	.00454

Only the higher octane gasolines are shipped to the West Virginia bulk plants, and taking this fact into consideration, the officials of the company believe, and would testify, that the prices charged to the West Virginia bulk plants are in comparison lower than those charged to other tank car customers for similar octane gasolines. For the first six months of 1933, the petroleum products shipped to the West Virginia bulk plants amounted to 5.59% of the total shipments from the refineries.

It is further stipulated that if competent witnesses on behalf of said company were called as witnesses herein, they would state that the company sold in West Virginia in 1932 a total volume of 2,806,195 gallons of motor fuel, and that its gross revenue therefrom, including gasoline gallonage taxes, was $464,502.

Sinclair Refining Company

The Sinclair Refining Company distributed petroleum products in the State of West Virginia, as of March 8, 1933, through 8 bulk plants and 86 retail agency outlets.

[fol. 332] The company owns no refineries in this state, but ships its products by rail from its refineries at Marcus Hook, Pennsylvania, and Wellsville, New York, to its several bulk plants in West Virginia. Distribution from the bulk plants to the company's agency stations and its industrial and commercial customers is made by motor truck.

The company owns outright no service stations. The prices charged to customers of the company are comparable to those charged to its agency stations, and the retail prices charged at the agency stations are uniform with those charged for similar products by competitors in the same territory.

The volume of petroleum products distributed from the West Virginia bulk plants and retail agencies for the year 1932 was 2,993,664 gallons.

The charge for products to the bulk plants is the market value of such products at the time of delivery, as obtained from quoted prices in the National Petroleum News, a recognized trade journal, and adding thereto the proper freight and container charges.

All products marketed by the Sinclair Refining Company, whether through its retail agencies or other dealers, bear the distinctive trade names and trademarks of the company, and are uniform in quality. The company has for many years carried on a national advertising campaign, in magazines and newspapers and over the radio. Such advertising stresses the trade names and brands of the company, and is addressed to the consumer. Dealer customer of the company receive the benefit of this advertising without direct [fol. 333] cost to them. Advertising is also done by bill board and other displays, and the company furnishes to its retail agencies and to its other dealer customers distinctive signs and display advertising. The company uses a system of sales promotion, the benefits of which are given to customers without charge. Dealers are also encouraged to use the uniform signs and color schemes designed by the company. Printed booklets and pamphlets advertising various products of the company are furnished without charge to agency stations and to dealer customers.

Prior to the adoption of the petroleum code under the national recovery act, the company furnished to dealers the necessary vending equipment for the handling of its products, in order to advertise its products and to assure the public that the dealer handled the genuine products of the company. Such equipment was kept in repair by the company.

It is further stipulated that if competent witnesses were called on behalf of the plaintiff herein, they would state that based on the prime cost of the products as shown by

the National Petroleum News prices, plus freight and container charges, the following is a correct statement of the operations of Sinclair Refining Company for the years 1931 and 1932, and for the first six months of 1933, respectively:

[fol. 334]	1931	1932	1933 (6 mo.)
Gross revenue after deducting retail agent's commission	$388,899	$356,267	$124,111
Prime cost of products based on N. P. N. prices and including freight and container cost	275,833	266,738	101,489
Direct operating and marketing costs applicable to West Virginia stations, including station rental	135,548	122,467	55,258
Proportion of district office and home office sales department expense, including bad debt expense	37,937	35,622	13,346
Loss for period	60,419	68,560	45,982
Gasoline gallonage tax	110,937	101,186	44,421

State Tax Revenues and Status of Funds

The principal funds and revenues of the state are classified as follows:

1. State Fund—General Revenue

This fund is the general fund of the state out of which the salaries and expenses of the executive, judicial and legislative officers, and the expenses of various state departments and institutions are paid. The fund is supported by a legislative appropriation of the general revenues of the state.

[fol. 335] 2. State Fund—Special Revenues

This fund is for the support of various state departments and institutions, the appropriations for which are provided by special collections and fees. No payments may be made from such an appropriation in excess of the amount set

forth in the appropriation or in excess of the amount actually collected.

3. General School Fund

The money in this fund represents the receipts of the state from capitation taxes, interest on the investment in the "school fund" (a fund provided by sec. 5, Art. XII, Constitution, the corpus of which within one million dollars cannot be expended), fines and forfeitures, interest on public deposits, certain license fees. Pursuant to Ch. 9, Acts of the Legislature, Extraordinary Session 1933, enacted June 3, 1933, the general school fund is to be used for the following purposes, in the order of preference as follows:

(1) To pay the salary of the state superintendent of free schools and the expenses of his office.

(2) To "pay toward" the salaries of each county superintendent of schools, on the basis of twenty cents per pupil.

(3) "To pay to each district a sum sufficient to supplement materially the elementary teachers' fund by paying for each needed teacher for a period of four months," according to the schedule provided.

(4) "To pay to each district a sum sufficient to supplement materially the junior and senior high schools teachers' [fol. 336] fund by paying for each needed teacher for a period of four months," according to the schedule provided.

(5) To supplement the elementary and high school funds in districts where the maximum levies will not maintain the schools for the minimum term.

For each of the fiscal years 1930 and 1931, money was appropriated from general revenues to supplement the "General School Fund" in the amounts of $1,000,000 and $1,250,000, respectively. Acts of the Legislature of West Virginia (1929), Chap. 89, Sec. 28. For the fiscal years 1932 and 1933, there was appropriated to supplement the "General School Fund" to meet the requirements of law relating to state aid for elementary schools the amounts of $925,000

and $1,175,000, respectively. Acts of the Legislature of West Virginia (1931), Chap. 67, Sec. 36-(a). For each of the fiscal years 1934 and 1935, the "General School Fund" was to be supplemented by an appropriation of general revenue in the amount of $5,500,000. Section 30-(c) of the appropriation bill, enacted June 3, 1933 (Ch. 1, Extraordinary Session, 1933), made this appropriation in the following language:

	1934	1935
"To supplement the General School Fund to meet the requirements of law relating to state aid or maintenance of local schools. For the purpose of paying four months teachers' salaries and for equalization fund purposes	$5,500,000	$5,500,000

[fol. 337] The above appropriation to be transferred to the General School Fund on the requisition of the Governor at such times and in such amounts as the receipts of the State Fund-General Revenue will, in the opinion of the Governor, permit."

4. State Road Fund

This fund consists of the receipts from the various forms of licenses and fees imposed upon the operation of motor vehicles, the operation of filling stations and distributing stations and the sale of gasoline, as well as the proceeds of state road bonds.

Other special funds and revenues of the state are of no relevancy in this proceeding. It is agreed that there is no fund entitled "general fund for the elementary schools" as designated in House Bill No. 112. The only state fund from which appropriations are made for elementary school purposes is the "General School Fund" above described.

The cash balance in the "General School Fund" on various dates during the past two years, as shown by the records in the office of the Treasurer of West Virginia, has been as follows:

December	31, 1931,	Balance	$425,118.95
July	30, 1932,	Deficit	182,582.47
December	31, 1932,	Balance	252,429.51
June	30, 1933,	Balance	288,023.66
October	31, 1933,	Balance	440,830.31

Pursuant to the aforesaid legislative appropriations, transfers have been made from time to time from the "State Fund—General Revenue" to the "General School Fund", including the amount of $697,400 during the fiscal year ending June 30, 1932, the amount of $804,683 during [fol. 338] the period from December 31, 1932, to June 30, 1933, and the amount of $1,511,235 during the period from June 30, 1933, to October 31, 1933.

During the period from July 1, 1933 (which marks the commencement of the current fiscal year of 1934), to October 31, 1933, the records in the office of the Tax Commissioner of West Virginia show that the following sums have been collected and credited to the General School Fund:

Receipts

General School Fund, July 1, 1933, to October 31, 1933

Source:	
Capitalization	$72,281.41
Fines by Courts	1,297.14
Inteerst on Bonds ("The School Fund")	16,312.39
Interest on Deposits	10,010.39
License Tax on Certain Business	52,259.21
Marriage Licenses	14,367.14
Redemption of Land	10,472.68
Sale of Delinquent Land	17,531.72
Sale of Forfeited Land	7,813.02
Examination Fees	501.00
Certificate Fees	5,742.32
Sale of Confiscated Automobiles	320.11
License tax—Tax Commissioner	55,766.77
Horse Racing Fund	1,322.37
Sub-total	265,997.67
Federal Aid—Smith-Hughes	6,222.63
Federal Aid—George-Reed	5,611.71
[fol. 339] Federal Rehabilitation	6,296.06
Sub-total	$284,128.07
Transfer from State Fund—General Revenue	1,511,235.00
Total receipts	$1,795,363.07

During the said period the disbursements from said fund, as shown by the records in the office of the Tax Commissioner of West Virginia, have been as follows:

Disbursements

General School Fund, July 1, 1933, to October 31, 1933

Salary—Assistant	$1,040.00
Salary—High School Supervisor	1,040.00
Salary—Rural Supervisor	1,040.00
Salaries—Clerks and Stenographers	7,050.00
Current	1,299.81
Travel	249.08
Printing, Binding and Stationery	3,245.29
Expense of Superintendent of Education	172.60
Investigation and Research	1,178.40
Deficiency Appropriation	7,850.43
Salary—Member Board of Education	600.00
Expense, Member Board of Education	844.78
Expense—Advisory Member	82.85
Salary and Expense—Secretary	1,118.15
Salary—Stenographer	440.00
State Rehabilitation	4,646.19
State Vocational	10,907.55
Aid to Certain Students	112.50
Salaries County Superintendents	22,855.38
Uniform Examinations	5,191.25
Land Department	7,780.43
Horse Racing	250.00
Federal Rehabilitation	250.00
Federal Aid—Smith-Hughes	33,429.78
[fol. 340] Federal Aid—George-Reed	15,195.68
Expense License Tax Collections (T. C.)	4,339.67
Aid to Teachers	1,511,360.00
Total disbursements	$1,643,579.82

The cash balance in the "State Fund—General Revenue" on various dates during the past two years, as shown by the records in the office of the Treasurer of West Virginia, has been as follows:

December 31, 1931, Deficit	$1,621,916.86
June 30, 1932, Deficit	700,467.27

December	31, 1932,	Deficit	2,198,998.01
June	30, 1933,	Balance	459,442.88
October	31, 1933,	Balance	1,814,835.67

In the period from December 31, 1932, to June 30, 1933, the "State Fund—General Revenue" was augmented by borrowed funds in the amount of approximately $3,500,000. From June 20, 1933, to October 31, 1933, the amount of approximately $3,612,234.05 was realized from the sale of state bonds and the discount of state notes with the Workmen's Compensation Fund and placed in the said "State Fund—General Revenue".

The balance of $1,814,835.67 in the "State Fund—General Revenue", as shown above, for the period ending October 31, 1933, includes Special Revenue funds in the amount of $239,521.17.

For the period commencing July 1, 1933, and ending October 31, 1933, the records in the office of the Tax Commissioner of West Virginia, show that the following sums have been collected and credited to the State Fund—General Revenue:

[fol. 341] Receipts

State Fund, General Revenue, July 1, 1933, to October 31, 1933

Source:	
State Tax from Sheriffs	$235,837.23
Public Service Corporation Tax	940.00
Fees—Auditor—Land	10.50
Fees—Auditor—Corporation	20.00
Fees—Auditor—Insurance	4,679.00
Fees—Secretary of State	4,970.00
Fees—Banking Commissioner	4,771.58
Fees—Banking Commissioner—B. & L	600.00
Prohibition—Permits	1,188.00
Prohibition—Enforcement	1,120.75
Medicinal Liquor	8,820.60
Beer License Tax	142,682.03
Wine or Vinous Tax	1,416.30
Fees—Supreme Court	2,619.50
Fees—Law Examinations	395.00
Charter Tax	173,587.85
Statutory Attorney Fee	3,640.00

Sale of Books	708.70
Re-deposit—O. S. Checks	58.45
Store Tax	9,637.00
Store Tax—Fees	1,722.50
Gross Sales	1,498,706.04
Tax on Seal	874.00
Tax on Insurance	1,324.48
Collateral Inheritance	57,495.37
Board of Control Collection	1,188.68
Miscellaneous	2.63
Individual Income	7,987.56
Transfer from Special to General	13,527.52
Interest on State Bonds	41,309.33
Total 4 months	$2,221,840.60
[fol. 342] Net proceeds, sale of state bonds ($2,500,000), and discount of notes, and note on loans from Workmen's Compensation Fund ($1,100,000)	3,612,234.05*
Total receipts	$5,834,074.65

During the said period the disbursements from said fund have been as follows:

Disbursements

State Fund, General Revenue, July 1, 1933, to October 31, 1933

Governor's Office	$27,232.55
Auditor's Office	28,191.52
Treasurer's Office	9,479.81
Attorney General's Office	8,987.20
Secretary of State's Office	5,604.58
Commissioner of Agriculture's Office	83,487.35
Supreme Court	28,244.65
Law Library	3,211.77
Circuit Court	58,713.28

*Figure ascertained from records in office of Treasurer of West Virginia.

Capitol Building and Ground	8,773.47
Mansion and Ground	2,148.76
Public Welfare	44,209.06
Adjutant General	37,035.88
State Senate	14,736.66
House of Delegates	12,643.75
Keeper of the Rolls—Salary	75.00
Public Service Commission—Salaries	4,999.98
Superintendent of Schools—Salary	1,666.64
Aid to Local Schools	1,511,235.00
Tax Commissioner's Office	17,211.93
Department of Labor	8,892.49
Banking Commissioner	9,894.63
Archives and History	2,974.87
Department of Mines	55,869.97
Department of Health	29,053.71
[fol. 343] Sinking Fund	2,297.17
Welfare Department	1,674.70
Criminal Charges	39,455.64
Paid on Loan	1,500,000.00
Rent of Annex	3,791.66
Finnell	250.00
Paving	704.98
Store License Tax	1,129.05
State Agents	60.80
Miscellaneous	2,858.97
State Board of Control	17,730.96
State University, Colleges, Experiment Station, Extension Work	496,911.40
State Penitentiary, Corrective and Eleemosynary Institutions	190,883.55
State Hospitals, Sanitariums, Tuberculosis Clinic, Training School, Dental Examiners, Board of Nurses	280,644.74
Pt. Pleasant Monument, Berkeley Springs Park, Rumseyan Society	2,471.01
Geological Survey	7,380.37
Pharmacy Board	7.47
Public Safety	97,901.87
Printing, Binding and Stationery	57,383.98
Total	$4,718,103.03

From July 1, 1933, to December 11, 1933, the receipts and disbursements of said State Fund—General Revenue, were as follows:

Receipts

Balance in fund July 1, 1933	$459,442.88	
State tax due from Sheriffs	248,394.17	
Fees, Auditor's Office	6,667.43	
Fees, Secretary of State	18,704.82	
Fees, Commissioner of Banking	5,474.40	
Liquor tax	11,916.60	
Beer license tax	165,787.17	
[fol. 344] License tax on charters	191,746.95	
Chain store tax	12,311.50	
Gross sales tax	2,030,893.28	
Individual income tax	27,187.83	
Collateral inheritance tax	74,320.92	
Board of Control funds	478,497.20	
Loans to state fund:		
Revenue anticipaition notes	1,084,250.00	
Refunding bonds	2,500,000.00	
Miscellaneous receipts	143,173.03	
		$7,458,768.18

Disbursements

From 1934 appropriations (including $2,307,692.50 transferred to general school fund)	$4,324,848.63	
Payment of loans	1,559,753.52	
Transfer to capitol building fund	500,000.00	
From 1932 and 1933 appropriations, collection accounts and miscellaneous	643,330.36	
		7,027,932.51
Balance December 11, 1933		$430,835.67

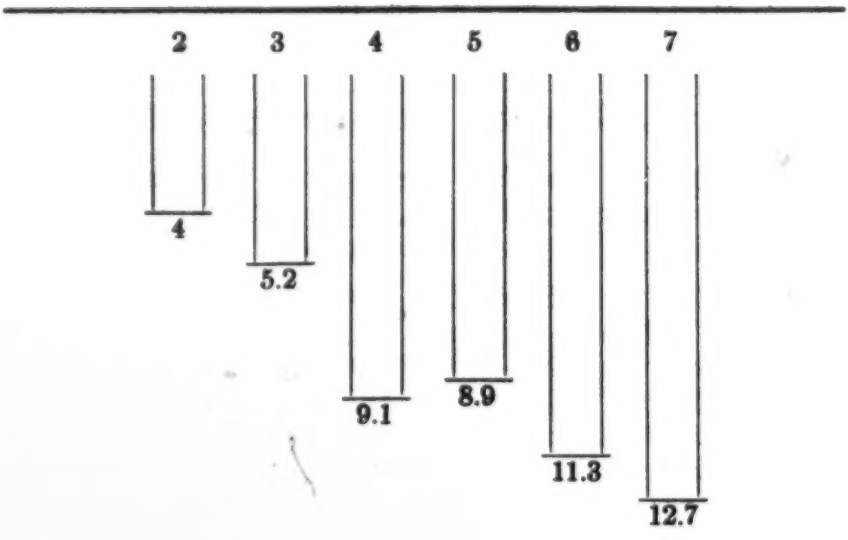
Taxation and Gasoline Consumption

It is stipulated that the National Automobile Chamber of Commerce published the following statistics and chart in a publication by it entitled "Facts and Figures in the Automobile Industry, 1933" purporting to show the effect of increases in gasoline taxes upon the consumption of gasoline:

[fol. 345] Gasoline Tax Rate Chart

All States

Cents per Gallon



Percentage decrease gasoline consumption, 1933 compared with 1931

Groups of Competitive Service Stations

It is agreed that the book of photographs filed herewith and marked Exhibit No. 5 correctly shows certain service stations in the State of West Virginia, as hereinafter described.

It is further agreed that the information hereinafter set out with respect to said stations, would be testified to by competent witnesses on behalf of the plaintiff, and other

persons, firms, and corporations interested in said stations, if called upon to testify herein.

[fol. 346] The following described photographs show stations operated by agents under lease and agency agreements with the plaintiff company:

Photo No. 1: Daniel Boone Service Station, W. H. Wills, agent, Falls View, West Virginia; gallonage for 1932, 36,392; gross sales petroleum products, $7,555.87; agent's net profit, $169.63.

Photo No. 2: Hanson and Slack, Malden, West Virginia; gallonage for 1932, 32,360; gross sales of petroleum products, $6,636.56; agent's net profit, $194.42.

Photo No. 3: W. C. Alfred, Poca, West Virginia; gallonage for 1932, 15,295; gross sales of petroleum products, $3,064.64; agent's net profit, $66.42.

Photo No. 4: Guy D. Brown, Montgomery, West Virginia; gallonage for 1932, 187,301; gross sales of petroleum products, $40,810.24; agent's net profit, $1,993.60.

The following described photographs show stations operated by agents under vending privilege and agency agreements with the plaintiff company:

Photo No. 5: Quincy Coal Company, Dickinson, West Virginia; gallonage for 1932, 14,472; gross sales of petroleum products, $3,014.15; agent's net profit, $43.80.

Photo No. 6: E. B. and N. M. Long, Sissonville, West Virginia; gallonage for year ending August 31, 1933, 8,630.

The following described photographs show stations op-
[fol. 347] erated by individual dealers selling products of the plaintiff:

Poto No. 7: Defiance Service Station, Gauley Bridge, West Virginia; gallonage for 1932, 73,114; chain store tax, $2.50.

Photo No. 8: Lane's Garage, Belle, West Virginia; gallonage for 1932, 34,566; chain store tax, $2.50.

Photo No. 9: J. G. Thumm, 1627 Bigley Avenue, Charleston, West Virginia; gallonage for 1932, 34,536; gross revenue, $7,259.58; chain store tax, $2.50.

The following groups of photographs show competing stations at various points where stations of the plaintiff are located in close proximity to one or more stations of other companies:

Group "A"

Charleston, W. Va.

Photo No. 10-a: Standard Oil Company station, corner Washington and Greenbrier Streets; gallonage for 1932, 162,486; gross revenue, $32,400; chain store tax, $239.45.

Photo No. 10-b: Viking Distributing Company station, corner Washington and Greenbrier Streets; gallonage for 1932, 148,248; gross revenue, $25,488; chain store tax, $18.30.

Photo No. 10-c: American Oil Company, Jake Householder, agent, Washington Street between Greenbrier and Duffy Streets; gallonage for 1932, 218,905; chain store tax, $21.50.

[fol. 348] Group "B"

Charleston, W. Va.

Photo No. 11-a: Eastern Garage, Standard Oil Company agency, Elizabeth Street, adjoining Elk Refining Company station; gallonage for 1932, 51,153; gross revenue, $8,600.54; chain store tax, $239.45.

Photo No. 11-b: Elk Refining Company station, corner Elizabeth and Jackson Streets; gallonage for 1932, 55,827; gross revenue, $7,778.76; chain store tax, $18.32.

Group "C"

Charleston, W. Va.

Photo No. 12-a: Standard Oil Company station on Midland Trail across New York Central Railroad from corner Kanawha and Washington Streets; gallonage for 1932, 198,704; gross revenue, $37,194; chain store tax, $239.45.

Photo No. 12-b: Pure Oil Company station on Midland Trail, near Standard station; gallonage for 1932, —; gross revenue, $—; chain store tax, $177.13.

Photo No. 12-c: American Oil Company station, Kanawha and Washington Streets; gallonage for 1932, 106,067; gross revenue, $16,514.69; chain store tax, $21.50.

[fol. 349] Group "D"

Fairmont, W. Va.

Photo No. 13-a: Standard Oil Company station, corner Cleveland and Locust Streets, one block from Jackson and

Jefferson Streets; gallonage for 1932, 145,521; gross revenue, $27,736; chain store tax, $239.45.

Photo No. 13-b: American Oil Company station, corner Jackson and Jefferson Streets; gallonage for 1932, 182,453; gross revenue, $30,046; chain store tax, $21.50.

Photo No. 13-c: Freedom Oil Works station, corner Jackson and Jefferson Streets; gallonage for 1932, 133,192; gross revenue, $35,411.78; chain store tax, $4.50.

Group "E"

Huntington, W. Va.

Photo No. 14-a: Standard Oil Company station, Third Avenue and Fourteenth Street; gallonage for 1932, 112,340; gross revenue, $19,457; chain store tax, $239.45.

Photo No. 14-b: Elk Refining Company station, Third Avenue and Fifteenth Street, gallonage for 1932, 75,766; gross revenue, $11,418; chain store tax, $18.32.

Photo No. 14-c: Gulf Refining Company station, Third Avenue and Fifteenth Street; gallonage for 1932, 85,767; gross revenue, $13,264; chain store tax, $236.28.

[fol. 350] Group "F"

Huntington, W. Va.

Photo No. 15-a: Standard Oil Company station, Fifth Avenue and Thirty-first Street; gallonage for 1932, 134,709; gross revenue, $23,636; chain store tax, $239.45.

Photo No. 15-b: Gulf Refining Company station, Fifth Avenue and Thirty-first street; gallonage for 1932, 126,213; gross revenue, $19,575; chain store tax, $236.28.

Photo No. 15-c: South Penn Oil Company station, Fifth Avenue and Thirty-first Street; gallonage for 1932; 33,474; gross revenue, $5,755; chain store tax, $25.40.

Group "G"

Parkersburg, W. Va.

Photo No. 16-a: Standard Oil Company station, Sixth, Seventh and Ann Streets; gallonage for 1932, 177,959; gross revenue, $29,636; chain store tax, $239.45.

Photo No. 16-b: Gulf Refining Company station, Seventh and Juliana Streets, one block from Ann Street; gallonage for 1932, 95,696; gross revenue, $12,876; chain store tax, $236.28.

Photo No. 16-c: Pure Oil Company station, corner Seventh and Juliana Streets; gallonage for 1932, —; chain store tax, $177.13.

Photo No. 16-d: Sterling Oil Company station, corner Eighth Street and Murdock Avenue, approximately one block from Standard station; gallonage for 1932, 160,601; gross revenue, $21,664; chain store tax, $16.50.

[fol. 351] Group "H"

Wheeling, W. Va.

Photo No. 17-a: Standard Oil Company station, Byrd Avenue and National Road; gallonage for six months, 1933, 60,413; gross revenue, $11,576; chain store tax, one-half year, $119.72.

Photo No. 17-b: American Oil Company station, William Price, dealer, National Road near Byrd Avenue; gallonage for six months, 1933, 39,431; gross revenue, $—; chain store tax, one-half year, $10.75.

Photo No. 17-c: Sun Oil Company station, William Roth, dealer, National Road near Byrd Avenue; gallonage for six months, 1933, 86,986; chain store tax, one-half year, $1.25.

Photo No. 17-d: Spears Brothers station, National Road near Byrd Avenue; gallonage for six months, 1933, 66,161; gross revenue, $10,130; chain store tax, one-half year, $3.64.

The gross revenue figures shown in the above tabulations, relating to the stations shown in said photographs, are exclusive of gallonage taxes imposed upon the sale of motor fuels.

The average chain store tax assessed against each station of the distributing companies above named for the year 1933 under the Act here in question, is as follows:

Viking Distributing Company	$18.30
American Oil Company	21.50
Elk Refining Company	18.32
Pure Oil Company	177.13

Freedom Oil Works Company	4.50
[fol. 352] Gulf Refining Company	236.28
South Penn Oil Company	25.40
Sterling Oil Company	16.60
Sun Oil Company (dealer)	2.50
Spears Brothers, Inc	7.28

It is agreed that the seven printed page proofs of advertisements filed herewith as Exhibits 4-A, 4-B, 4-C, 4-D, 4-E, 4-F, and 4-G are copies of advertisements actually run by the plaintiff in newspapers circulated in the territory served by it, and are representative of the character of such advertisements which the plaintiff customarily publishes in such newspapers and other publications.

Defendant's Individual Responsibility

It is admitted that while the defendant is not personally insolvent, he is not possessed individually of money or property, personal or real, to the value of $240,000.00, and that so far as may reasonably be anticipated, said defendant will not be possessed in his personal capacity, of available money or property in an amount sufficient to enable him to respond in damages to the money judgment or decree which will be entered in favor of the plaintiff in the event that it should prevail in this or any other proceeding for the recovery of the money so paid. As to whether he will be so possessed of said amount of money in his official capacity, no stipulation is made. The official bond of the defendant is in the penalty of Five Thousand Dollars ($5,000.00), as provided by Sec. 1, Art. 1, Chap. 11, Code of West Virginia.

[fol 353] Impounding of Tax Paid Under Protest

The sum of money, $240,173.50, paid under protest by the plaintiff, has been deposited by defendant, and pursuant to the preliminary restraining order entered herein, said sum remains on deposit in varying amounts in certain banks in the State of West Virginia, as a special account in the name of "Fred L. Fox, State Tax Commissioner, Special Account, Chain Store Tax."

It is stipulated that counsel on either sider herein may use, and the Court may consider herein, any fact contained in any stipulation made by the parties and filed in any of

the following styled causes now pending in this Court, to-wit: Gulf Refining Company v. Fred L. Fox, Sinclair Refining Company v. Fred L. Fox, and Ashland Refining Company v. Fred L. Fox, as well as any allegations of the respective bills of complaint in said causes which are not denied by the answers thereto; subject to the right of either party to object to the competency or materiality of any such matter. And it is further stipulated that upon any appeal or appellate proceeding which may be taken in this cause, any of such portions of said three records as may be designated by either party shall be copied into the appellate record for consideration, subject to the same right of objection.

The facts stated in this stipulation are not exclusive, but are to be considered in addition to those facts alleged and admitted or not denied by the pleadings; and in case of [fols. 354-485] conflict or variance between the pleadings and this stipulation the latter shall be taken as true.

It is further stipulated and agreed that the facts herein set out are agreed upon by the parties for the purposes of this cause only, upon the hearing or hearings thereof, and in any and all appeals or appellate proceedings or review in any court or courts wherein such proceedings may be had or prosecuted; and that this stipulation shall not be used to the prejudice of any party hereto in any other proceeding or proceedings now pending or hereafter instituted, in any court or courts, or in any wise whatsoever.

It is further stipulated that each party hereto reserves the right to object to the consideration as evidence of any fact herein stipulated, upon the ground of the irrelevancy or immateriality of such fact.

Dated this 18th day of December, 1933.

Standard Oil Company of New Jersey, by H. D. Rummel, Attorney. Fred L. Fox, Individually and as Tax Commissioner of the State of West Virginia, by Homer A. Holt, Attorney General of West Virginia.

[fol. 486] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

In Equity. No. 3312

STANDARD OIL COMPANY OF NEW JERSEY, a Corporation Created under the Laws of the State of Delaware, Plaintiff,

versus

FRED L. FOX, in His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia, Defendant

Before Soper, Circuit Judge, and McClintic and Chestnut, District Judges

OPINION OF THE COURT—Filed March 1, 1934

I concur.

W. Calvin Chesnut, U. S. District Judge.

I concur.

Geo. W. McClintic, U. S. District Judge.

SOPER, Circuit Judge:

This suit was brought to secure an injunction to restrain the State Tax Commissioner of the State of West Virginia from paying into the treasury of the State, the sum of $240,173.50 paid to him under protest by the plaintiff corporation upon his demand that under the provisions of an Act of the State Legislature passed on March 8, 1933, the money was due for license taxes upon certain gasoline filling stations and bulk distributing plants which it owned or controlled. The bill of complaint prays that a temporary restraining order and interlocutory injunction be issued; that upon final hearing the injunction be made perpetual; that the sum collected be declared a trust fund in the hands of the defendant for the use of the plaintiff, and that the defendant be required to account for and return it to the plaintiff. The grounds of the suit are: (1) that the application of the Act to operators of automobile service stations [fol. 487] violates the due process and equality clauses of the Fourteenth Amendment to the Federal Constitution; (2) that the Act violates the uniformity requirement of the

State Constitution; and (3) that when properly construed, the Act is not intended to apply to the places of business conducted by the plaintiff.

Sections 1 and 2 of the Act provide that it shall be unlawful for any person to operate any store in the state without first having obtained a license from the State Tax Commissioner; and require every person desiring to operate more than one store to make a separate application to the State Tax Commissioner for each such store. Section 5 provides that each person operating "one or more stores or mercantile establishments within this state" shall pay, upon each store, the following annual license fees: upon one store $2; upon 2 to 5 stores, $5; upon 6 to 10 stores, $10; upon 11 to 15 stores, $20; upon 16 to 20 stores, $30; upon 21 to 30 stores, $35; upon 31 to 50 stores, $100; upon 51 to 75 stores, $200; and upon more than 75 stores $250. The term "store" is defined to mean and include "any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled" by the same person "in which goods, wares or merchandise of any kind are sold either at retail or wholesale". Section 9 provides that any person who shall violate any of the provisions of the Act shall be guilty of a misdemeanor, and upon conviction, fined not less than $25, nor more than $100; and that each day that such violation continues shall constitute a separate and distinct offence. Section 11 provides that no injunction shall issue from any court in the State enjoining the collection of any license tax provided by the act, but the party claiming that any license is not due, shall pay the same under protest "with right to collect the same from the State Tax Commissioner by an appropriate remedy as provided by law". These sections are set out in full in the margin. (See end of opinion.)

It is alleged in the bill of complaint that the plaintiff is the Standard Oil Company of New Jersey, a corporation [fol. 488] incorporated under the laws of the State of Delaware, and is chiefly engaged in the business of refining, transporting and distributing, at wholesale and retail, in various states of the Union, including West Virginia, gasoline, kerosene, oils, grease, and divers other petroleum products. In 1933 it owned or controlled in West Virginia

949 service or filling stations, or places of business, either through ownership or lease of the premises, or through contractual relations with the owners or persons in control of the premises. This total consisted of 101 stations, owned or leased by the plaintiff and operated by it, called company owned stations; 388 stations, called leased outlets, leased to the plaintiff and operated by the lessor or some other person in control of the premises under commission contracts with the plaintiff; and 460 stations, called vending privilege outlets, at which the plaintiff acquired by lease the right to store and sell its products, and which were operated by the lessor or other person in control under commission contracts. The control of the plaintiff of all of these stations is so complete that the plaintiff does not deny that they are operated by it within the meaning of the act. In addition, it operated 54 bulk or distributing plants, maintained principally as supply depots for the storage and distribution of petroleum products to the said service stations or dealers handling its products and to commercial and industrial customers throughout the state. A relatively small quantity of petroleum products is sold on the premises of the bulk stations.

The defendant is the Tax Commissioner of the State of West Virginia, and is a citizen and resident of that state, and has his office in the City of Charleston. He is charged with the duty of enforcing all the tax laws of the state, including the act which is the subject of this suit. On June 5, 1933, subsequent to the passage of the act, he issued and circulated throughout the state, a written order, wherein he notified the operators of all stores and mercantile establishments that within seven days thereafter, they must make application for licenses under the act on pain of the penalties therein imposed; and he ruled and declared that the act imposes license fees upon the plaintiff for the privilege [fol.489] of operating its gasoline filling stations and bulk distributing plants in the state, according to the schedule of fees prescribed by Section 5 of the act, and advised the plaintiff that unless it immediately filed applications for the licenses, and paid the fees, it would render itself subject to the penalties and fees provided in Section 9 of the act. Pursuant to these rulings and directions, the plaintiff, on June 6, 1933, filed its application for licenses for 1003 locations in the state, accompanying the application, however,

with a letter stating that the act imposed no liability for license fees upon it; and that it paid the same, under protest and duress, for the sole purpose of avoiding the imposition of fines and penalties in the event that the validity and applicability of the act should be sustained. The amount paid was $240,173.50, composed of the fees scheduled in the act and the sum of 50¢ for each application, as required by the law.

Since the relief prayed in the bill of complaint constituted an interference with the enforcement of a state statute upon the ground that it is invalid under the federal Constitution, and since the application for interlocutory injunction was pressed on this ground, a court of three judges was properly organized to try the case under Section 266 of the Judicial Code, 28 U. S. C. A. 380. Stratton vs. St. Louis S. W. Ry., 282 U. S. 10; Public Service Corporation vs. Batesville Telephone Co., 284 U. S. 6; Sterling vs. Constanin, 287 U. S. 378.

The defendant filed a motion to dismiss, and also an answer to the bill of complaint. The motion to dismiss is based on the ground that the federal questions raised are frivolous and unsubstantial; and that in any event, there is no equitable jurisdiction because the complainant has a complete and adequate remedy at law.

When the case came on for hearing, it was contended in support of the motion to dismiss that the right of a state to impose a graduated license tax upon a chain of stores has been firmly established by the decisions of the Supreme Court in Tax Commissioners vs. Jackson, 283 U. S. 527, and Liggett Company vs. Lee, 288 U. S. 517; and that, therefore, under the rule laid down in Ex parte Joseph Poresky, 290 U. S. 30, the contention that the present act [fol. 490] is contrary to the Fourteenth Amendment to the federal Constitution is so obviously unsound that it raises no substantial federal question. Whether such a question is present in such a way as to give jurisdiction to the court must be determined by the allegations of the bill; and in view of the subsequent discussion herein of the constitutionality of the West Virginia Act, we need only point out here that the plaintiff asserts in the bill of complaint that it does not enjoy the peculiar economic advantages upon which the separate classification of chain stores for taxation was upheld by the Supreme Court in the cases cited;

that the tax imposed by the West Virginia Act is so high that it substantially equals the net earnings of the plaintiff on all of its outlets in the state during the year 1932, and exceeds the net earnings of 95% of said outlets; and that, in the practical operation of the act, there is an arbitrary discrimination between the business of the plaintiff and other oil companies, on the one hand, and the business of other general commodity chain organizations, on the other, in that in the former the ratio of the tax to the gross revenue is very high, and in the latter the ratio is very low, with the result that gross inequality in the burden of taxation ensues.

The right of the plaintiff to invoke the equitable jurisdiction of the court depends upon the absence of an adequate remedy at law. A suit to enjoin the collection of a state tax on the ground that it involves an arbitrary and unreasonable discrimination against the taxpayer in violation of the Fourteenth Amendment will not lie in a federal court when, under the laws of the state, provision is made for the payment of the tax under protest with the right to bring suit for its recovery against the collecting officer or authority, and when means are provided for the satisfaction of any judgment that may be obtained. Henrietta Mills vs. Rutherford County, 281 U. S. 121; Matthews vs. Rodgers, 284 U. S. 521; Stratton vs. St. Louis & S. W. Ry. Co., 284 U. S. 530; (see also s. c. 282 U. S. 10). Section 11 of the West Virginia statute provides that the collection of the license tax shall not be enjoined by any court of the state, "but the party claiming that any license is not due for any reason, shall pay the same under protest, with right to collect the same from the State Tax Commissioner by an appropriate remedy as provided by law." Section 10 provides that all money collected under the provisions [fol. 491] of the act shall be paid into the state treasury monthly by the State Tax Commissioner, and shall be added to and shall constitute a part of the general fund for the elementary schools.

The bill of complaint charges, and the answer admits, that prior to the institution of the suit, the Tax Commissioner had declared his intention to pay the license monies paid to him by the plaintiff into the State Treasury on the first day of July, 1933, and that such action would take

place unless the Tax Commissioner was enjoined and restrained from so doing.

The remedy at law provided by the statute is the right to collect the license monies from the State Tax Commissioner by an appropriate remedy, as provided by law. How this right is to be exercised is not made definite; nor is it made clear how the taxpayer, if successful in a suit brought for the purpose, may recover back his money. The defendant says that appropriate remedies are provided by Section 1, Article 3, Chapter 12, and Sections 1 to 5 of Article 2 of Chapter 14 of the West Virginia Code. The first mentioned statute provides in substance that every person claiming to receive money from the treasurer of the state shall apply to the auditor for a warrant for the same; that the auditor shall examine the claim and the evidence supporting it, and shall issue his warrant on the treasurer for so much of the claim as he shall find to be justly due from the state, if payment thereof be authorized by law and there be an appropriation not exhausted or expired out of which it is properly payable. On presentation of the warrant to the treasurer, he must ascertain whether it has been drawn in pursuance of an appropriation made by law, and if so, he is authorized to endorse his check upon the warrant directed to some depository and payable to the person who is to receive the money.

The second statute provides in substance that any person having a pecuniary claim against the state, which the auditor has disallowed in whole or in part, may apply by petition to the circuit court of the county in which the seat of government is, to have the claim audited and adjusted. Provision is made for answer by the auditor, the produc-[fol. 492] tion of evidence by either party, and a hearing without unnecessary delay. The court is required to ascertain what sum, if any, is due to the petitioner, and to certify its decision to the auditor; and if the claim, or any part thereof, is allowed, the auditor must report the same to the legislature at its next session; but no such claim shall be paid until an appropriation shall be made therefor by the legislature. It is also provided that all suits in which it may be necessary to make the governor, the attorney general, the treasurer or the auditor a party defendant as representing the state, shall be brought and prosecuted in the circuit court in which the seat of government is.

In considering whether these statutes provide an adequate remedy at law, we are, at the outset, met with inquiry as to their meaning and with the well established rule that a remedy is not considered adequate unless the statute which authorizes it is free from doubt and ambiguity, or unless its meaning has been clearly established by the decisions of the state courts. Thus, it has been held that when the statute relied on is a recent one, and has not been construed and applied by the highest court of a state, or when the meaning of the statute is not free from ambiguity or doubt, it cannot be said that the complaining party suing or plaintiff has an adequate or complete remedy at law. On the contrary, the existence of the remedy is debatable and uncertain. Wallace vs. Hines, 253 U. S. 66, 68; Atlantic Coast Line R. Co. vs. Daughton, 262 U. S. 413; Union P. R. Co. vs. Weld County, 247 U. S. 282, 287.

The meaning of the West Virginia statutes cited in connection with the kind of suit now before the court has not been made clear by the decisions of the West Virginia courts. It was held in Woodall vs. Darst, 71 W. Va. 350, that a mandamus may be employed against the auditor to enforce payment of a claim for which an appropriation has been made, the constitutionality of which the auditor questions. It was also held in Robinson vs. LaFollette, 46 W. Va. 565, that the proceeding provided by Ch. 14, Article 2, Sections 1 to 5, is not a civil case, reviewable by the Supreme Court on writ of error, but is merely a statutory proceeding for the auditing of a claim against the state; and [fol. 493] that even after the claim is audited by the circuit court, it must pass through the legislature before it can be paid, and even there the appropriation may be contested.

It will have been noticed that Section 11 of the Chain Store Act does not give the taxpayer who makes payment under protest the right to collect the money from the treasurer of the state, but merely the right to collect the same from the State Tax Commissioner, and it cannot be said to be free from doubt that such a right is covered by the general terms of the statutes last mentioned which in terms give a person claiming to receive money from the treasury of the state the right to apply to the auditor for a warrant on the same; and there is no decision of the Supreme Court of West Virginia which throws any light upon the question.

It may be supposed that Section 11 of the Chain Store

Act, by the use of the term "appropriate remedy", contemplates a common law action of assumpsit for money had and received; but whether the remedy contemplated by the legislature is to be found in the terms of the statute permitting suit against the state auditor, or under the practice of the common law, in neither case is it free from doubt that provision has been made in any statute for the satisfaction of such a judgment as the taxpayer might obtain. There is no provision in the Chain Store Act itself, or in any other taxing statute to which our attention has been called similar to the state statute under consideration in Henrietta Mills vs. Rutherford County, supra, or in Atchison, T. & S. F. R. Co. vs. O'Connor, 223 U. S. 280.

The West Virginia chain store statute specifically provides that the money collected thereunder shall be paid into the state treasury monthly, and shall be added to and constitute a part of the general fund for the elementary schools. The stipulation of the parties, however, shows that there is no such fund. The principal funds and revenues of the state consist of (1) State Fund General Revenue; (2) State Fund Special Revenue; (3) General School Fund; (4) State Road Fund. The monies actually collected by the State Tax Commissioner from licensees under the Chain Store Act, other than those covered by the inter-[fol. 494] locutory injunction in this case and in three similar cases, were actually paid by the State Tax Commissioner into the State Treasury, and were there deposited as a part of the State Fund General Revenue. It is therefore obvious that the proper disposition of the fund is not free from doubt in the minds of the state officials for although the state possessed a general school fund, which was used to pay the salary of school officials and teachers, including payments sufficient to supplement the elementary teachers' fund, the license monies from the Chain Stores Act were not paid into this fund, but into the general revenues of the state.

If the doubt and uncertainty arising from this situation could be overcome, there would still remain the difficulty as to how license payments paid under protest to the State Tax Commissioner, and by him turned into the state treasury, might be recovered back if, in a suit by the taxpayer, the tax should be declared invalid or unconstitutional. It is clear from the provisions of Section 1, Article 3, Chapter 12, and Sections 1 to 5 of Article 2, Chapter 14, that a deter-

mination in favor of the claimant upon the state treasurer could not be honored unless payment was authorized by law, and unless there should be an unexhausted appropriation out of which it might be paid. Once paid into the treasury, monies could be taken out only by legislative appropriation.

The defendant claims that such a legislative appropriation is found in Section 30(c) Chapter 1 of the Acts of the West Virginia Legislature, the First Extraordinary Session of 1933, passed on June 3, 1933, whereby the sum of $5,500,000 was appropriated to supplement the General School Fund for the fiscal year beginning July 1, 1933, and a like sum for the fiscal year beginning July 1, 1934. The stipulation shows that the balance in this fund on October 31, 1933, for the first year mentioned, was $440,830.31, and that none of the appropriation for the fiscal year beginning July 1, 1934, has been expended. There is nothing in the Act appropriating these sums which indicates that the monies may be used for any other purpose than that designated in the Act, to wit, for the purpose of paying teachers' salaries for four months, and for equalization fund pur-[fol. 495] poses; but the defendant points to two other bills passed by the legislature at its First Extraordinary Session of 1933 as follows: Section 7 of Chapter 1 provides "for refunding monies erroneously paid into the treasury, such sums are hereby appropriated as may be so erroneously paid payable out of the same fund into which paid;" and Section 111 of Sub-section L of Chapter 1 provides for refunding overpayments made into the treasury on account of taxes, license fees and commissions, to be paid out of the fund into which they were paid, and appropriates such amount as may be necessary for the purpose. There are no decisions of the West Virginia Courts in which these statutes are construed, and it is an open question whether license taxes intentionally and understandingly paid to the State Tax Commissioner under protest are within the description of the statute as "monies erroneously paid into the treasury", or may be said to constitute an overpayment into the treasury on account of taxes and licenses. The doubt is increased when it is borne in mind that Section 10 of the Chain Store Act provides that money collected under it shall constitute a part of the General Fund for the Elementary Schools in the state treasury, notwithstanding the

fact that there is no such fund. This defect might be overlooked by the West Virginia courts, and the monies might be ordered to be paid out of the fund in which they have actually been deposited. But it cannot be said that the matter is entirely free from doubt. There is the additional doubt whether the sum of approximately $400,000, representing the balance in the General School Fund on October 31, 1933, would be sufficient to cover not only the payments made by the plaintiff corporation, but also those made by other persons who have paid the tax under protest and may bring an action to recover it back. Four oil companies, to wit: Standard Oil Company, Gulf Refining Company, Ashland Refining Company and Sinclair Refining Company have brought suit against the State Tax Commissioner to recover back the aggregate sum of $449,423 paid by them under protest.

No greater relief is available to the taxpayer if it be considered that it may have a right of action against the State Tax Commissioner in his individual capacity under Section 11, and the right to satisfy any judgment against him out of his individual assets. It is stipulated that although the [fol. 496] defendant is not personally insolvent, he is not possessed individually of money or property to the value of $240,000, and so far as may be reasonably anticipated, will not be possessed in his personal capacity of the amount sufficient to enable him to respond in damages to the money judgment or decree which will be entered in favor of the plaintiff, if it shall prevail in this or any other proceeding for the recovery of the money so paid. The official bond of the defendant is in the penalty of only $5,000, as provided by Section 1, Article 1, Chapter 11 of the Acts of West Virginia.

We think, therefore, that no adequate legal remedy has been afforded the plaintiff in this case, for it is established beyond controversy in the field of state taxation that the mere ability to obtain a fruitless judgment will not defeat the equitable jurisdiction. Osborn vs. Bank of U. S., 9 Wheaton, 738; Dodge vs. Woolsey, Fed. Cas. 18,032; 18 Howard, 331; Arkansas Bldg. & Loan Assn. vs. Madden, 175 U. S. 269, 274; Matthews vs. Rodgers, 284 U. S. 521; Stratton vs. St. Louis S. W. Ry. Co., 284 U. S. 530.

This court, therefore, is empowered to entertain the application for an interlocutory and final injunction; and hav-

ing taken jurisdiction, may proceed to decide all questions involved in the case, both state and federal, and to afford to the plaintiff not only the relief by injunction, but also if it finds that the tax was improperly collected, to decree that the defendant be required to account for and return the money to the plaintiff. Piedmont &c. Ry. Co. vs. Query, 56 F. (2d) 172; Greene vs. Louisville & I. R. Co., 244 U. S. 499; Atlantic Coast Line Ry. Co. vs. Daughton, 262 U. S. 413.

The plaintiff's objection that the act involves an arbitrary discrimination against the business of the oil companies' chains of gasoline stations, and therefore offends the Fourteenth Amendment, rests upon the practical effect of the application of the tax. The facts adduced to show this situation have been stipulated by the parties, and the more important of them are set out in the following recital. The total number of stores, including gasoline stations in the [fol. 497] state, for which licenses were issued under the act in 1933 was 15,210, and the total fees paid amounted to $569,693. Single stores in the number of 10,722 paid $26,-723, while multiple stores, in the number of 4,488 paid $542,970. Of the total, 4,453 gasoline stations paid $486,168, or 85.3%, and of this number, 2,453 chain gasoline stations paid $481,168 or 84.46% of the total tax, while 2,000 single stations paid $5,000. Five oil companies, including the plaintiff, paid $476,171 or 83.5%, and the plaintiff alone paid $240,173, or 42.16% of the total tax. These striking results were reached because the oil companies greatly exceed all other businesses in the number of units at which their products are sold, and the graded tax is sharply increased from $5 a store, if not more than five stores are maintained, to $250 per store if more than seventy-five are maintained.

In sharp contrast with the large proportion of the tax paid by the oil companies is the small relative volume of business which they do in comparison with other chain store businesses herein referred to as general commodity chains. In 1932, the last year for which complete figures are available, 2,453 gasoline chain stations did an aggregate business of $15,198,638, or 4.6% of the total business, and would have paid 84.46% of the total tax had the law then been in effect, while 1,889 general retail stores in chain organizations did an aggregate business of $75,454,257, or

22.9% of the total business, and would have paid 10.7% of the total tax. General commodity chain stores do a much larger business per unit, and have a smaller number of units in the state than the gasoline chains, but they enjoy all the advantages of chain store organizations since their business is of national scope and is carried on in many stores throughout the United States. The disparity in the application of the tax is shown in the following table in which the situation of the Standard Oil Company is compared with that of six other national general commodity chains. The figures are given for the year 1932 as if the chain store tax had been applicable at that time. For instance, it there appears that the Great Atlantic and Pacific Tea Company, maintaining 198 stores in the state, had a total gross revenue of $12,455,017, and would have paid a total chain store [fol. 498] tax of $38,521, or an average of $194.55 per store, while the Standard Oil Company with 1,046 stations, did a business of $6,428,701, and would have paid a total tax of $251,573, or an average tax per station of $240.51.

[fol. 498]

	No. of stores or stations	Average chain store tax	Total chain store tax	Average gross revenue per store	Total gross revenue
Sears, Roebuck & Company	4	$4.75	$19.00	$140,715.00	$562,861.00
Montgomery, Ward Company	7	6.50	45.50	151,154.00	1,058,083.00
S. S. Kresge Company	12	9.83	118.00	140,428.00	1,685,141.00
F. W. Woolworth Company	21	17.50	367.50	84,698.00	1,778,671.00
Kroger Grocery & Baking Co	94	132.64	12,469.00	58,503.00	5,499,343.00
Great Atlantic & Pacific Tea Company	198	194.55	38,521.00	62,400.00	12,455,017.00
Standard Oil Company:					
Company owned stations	98	240.51	23,569.98	26,822.00	2,628,615.00
All gasoline stations	1046	240.51	251,573.46	6,145.98	6,428,701.00 (including tires, &c.)

NOTE: The average revenue gross per station is calculated with the bulk plants excluded. If they are included, the average would be reduced.

[fol. 499] It is especially notable that the volume of business of the oil companies does not increase in proportion to the number of stations maintained. Generally speaking, the company owned stations of the Standard Oil Company

do a larger business than the leased and vending privilege outlets at which it distributes petroleum products through agents. In 1932 the company owned stations, 98 in number, did a business of $2,628,615, while 948 agency stations did a business of only $3,690,397. The average gross revenue of company stations was $26,822, and of the agency stations $3,892. In 1931 only 157 agency stations out of 815, and in 1932 only 131 out of 948, sold more than 40,000 gallons per annum. A table for the agency stations in 1932 follows:

(Here follows Table No. 6, side folio 500)

[fol. 500]

Table No. 6

Gross Revenue and Net Earnings to Plaintiff from Sale of Petroleum Products at Leased Outlets and Vending Privilege Outlets (Agency Stations) Grouped and Ranked According to Gallons of Motor Fuel Sold Calendar Year 1932

Group No.	Annual gallonage classificaton	No. outlets in group	Total gross revenue	Total store tax for group	Total net earnings	Profit or loss after payment store tax		Average gross revenue per outlet by groups	Average store tax per outlet	Average net earnings per outlet by groups	Profit or loss per outlet after deducting store tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	319	$307,080.18	$76,722.69	$4,384.00	$.....	$72,338.69	$962.63	$240.51	$13.74	$.....	$266.77
2	10— 20,000	247	637,075.07	59,405.97	12,672.63	.....	46,733.34	2,579.25	240.51	51.30	.....	189.21
3	20— 30,000	155	681,360.60	37,279.05	17,828.96	.....	19,450.09	4,395.22	240.51	115.02	.....	125.49
4	30— 40,000	96	586,096.07	23,088.96	15,016.10	.....	8,072.86	6,105.16	240.51	156.42	.....	84.09
5	40— 50,000	56	441,803.19	13,468.56	10,261.98	.....	3,206.58	7,907.19	240.51	183.24	.....	57.27
6	50— 60,000	22	211,534.59	5,291.22	3,007.07	.....	2,284.15	9,615.20	240.51	136.68	.....	103.83
7	60— 70,000	23	267,398.76	5,531.73	5,926.27	394.54	.....	11,626.03	240.51	257.56	17.05	.....
8	70—100,000	16	236,816.12	3,848.16	4,217.99	369.83	.....	14,801.00	240.51	263.62	23.11	.....
9	Over—100,000	14	321,232.44	3,367.14	11,770.60	8,403.46	.....	22,902.31	240.51	840.75	600.24	.....
	Totals	948	$3,690,397.02	$228,003.48	$85,085.60	$9,167.83	$152,085.71					
						Net loss...	$142,917.88					

Average gross revenue per outlet, 948 outlets combined, 1932.....	$3,892.82
Average net earnings per outlet, 948 outlets combined, 1932.....	$89.75

	For 948 outlets	Per outlet
Chain store tax based on computed average tax for 1109 units in 1932.....	$228,003.48	$240.51
Net earnings.....	$85,085.60	89.75
Payment of chain store tax out of capital.....	$142,917.88	$150.76

[fol. 501] The small volume of business done in most of the Standard Oil stations in the state is reflected in the small profits and the heavy burden of the tax when contrasted therewith. In 1931 the average profits of all the gas stations, excluding bulk plants, were $539.24 per station, while the tax, computed according to the rate of the Act of 1933, would have been $239.29. In 1932 the profit was $248.37 per station, and the estimated tax $240.51, and in the first six months of 1933 the loss per station was $94.39, to which must be added the tax of $119.72. The average net earnings in 1930 for 105 company owned stations were $3,000 per station; in 1931 for 96 such stations were $3,641 per station; in 1932 for 98 such stations were $1,782 per station, and in the first eight months of 1933 for 94 such stations were $109.72 per station, exclusive of the chain store tax. A much worse showing was made by the agency stations. In 1931 the average net earnings per outlet for 815 outlets were $173.85. In 1932 similar earnings for 948 outlets averaged $89.75, and in the first six months of 1933 there was a net operating loss per outlet for 856 outlets of $62.97. The taxes per store for the respective periods would have been $239.29, $240.51 and $119.72. The total chain store tax on these agency stations would have exceeded the profit in 1931 by $53,330; in 1932 by $142,917; and increased the loss in 1933 from $53,905 to $156,381. The experience of the four other leading oil companies doing business in the state, to wit; Gulf Refining Company, Pure Oil Company, Ashland Refining Company and Sinclair Refining Company, was less profitable than that of the Standard Oil Company.

It is contended by the defendant Tax Commissioner that these figures, although shown by the books and records of the plaintiff company, and by the stipulation of the parties, do not portray the real profit of the company from the operation of its stations. It is suggested that larger profits might have been realized and credited to some other department of the business, or to some affiliation of the company. The Attorney General of the State requested that he be furnished with the names of all the Standard Oil group of companies, including parent companies, subsidiary companies, and affiliates; the character of business engaged in by them; the character of the affiliation; and the separate [fol. 502] profits and losses of all of said companies for the years 1930, 1931, 1932 and the first eight months of 1933.

In reply to these questions it was shown that the Standard Oil Company, (incorporated in New Jersey), the parent corporation, is solely a holding company and owns all of the stock or an interest in a number of producing, manufacturing, transporting and marketing companies engaged in the petroleum and natural gas business and collateral enterprises in the United States, Canada, England, France, Germany, Italy, Poland, Australia, Brazil, Argentina, Mexico, Norway, Sweden, Dutch East Indies and other countries; and it was stipulated that the accountants of the company, if asked to furnish the information contained in the request of the Attorney General would decline to make further answer than that contained in the calculations referred to, or to give any information concerning the profits and losses of the subsidiaries and affiliations for the reason that such information would be immaterial to the matters involved in the case as it would concern matters outside of the marketing transactions of the plaintiff, the Standard Oil Company of New Jersey, a Delaware corporation. It is obvious that the request of the Attorney General was so broad that the plaintiff's accountants were justified in their refusal; and since, as shown in the findings of fact, the billing price at which the petroleum products were delivered by the company's refinery to the company's stations approximated the current market price, the profit or loss obtained by comparing these figures with the established selling price to the customer was the actual profit or loss of the marketing transactions on which the store tax was imposed.

While these results may have been affected by bad economic conditions generally prevailing, they were not wholly or even largely affected thereby. The official reports of the state show that during the year ending June 30, 1931, and June 30, 1932, the gallonage taxes collected, based upon the volume of gasoline sold, exceeded similar figures in the prior years from 1927 to 1930, and the figures for the year ending June 30, 1933, exceeded those in the years ending in 1927, 1928 and 1929. It is possible that overproduction and competition of oil companies during the period may have caused them generally to conduct their business at a [fol. 503] loss, but the record is silent on this point. In any event, general bad business conditions did not materially affect the volume of sales during 1931 and 1932. The figures at least warrant the final conclusion that the addi-

tion of large numbers of new stations, in excess say of 150 stations, has been accompanied by diminishing rather than increasing returns; that the volume of business of even the very best stations has been on the average less than one-half of the average business done by general commodity stores in their least active units, and that the volume of business on the average of all gas stations over 150 per chain has been so small that little or no profit would have remained after payment of such a tax as that imposed by the statute. The net profits of general commodity chain organizations subjected to the tax, are not available, but the ratio of the tax borne by them to their gross revenue is in no way comparable with the similar ratio in the case of oil company stations, and it is a fair inference that a similar disparity exists as to the ratio of the tax to net earnings of each class of chain organizations.

With these facts in mind, we come to consider the contention that the West Virginia statute violates the equal protection clause of the Fourteenth Amendment. The principles which underlie classification for the purpose of taxation are familiar. They are summed up in Ohio Oil Company vs. Conway, 281 U. S. 146, 159, as follows:

"The states have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guaranties of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and per- [fol. 504] sonal property in a different manner. It may grant exemptions. The state is not limited to ad valorem taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be

to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. * * *"

"With all this freedom of action, there is a point beyond which the state cannot go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." * * *

We are led to inquire from this statement of the rule what was the object of the West Virginia statute under consideration. The surrounding circumstances lead irresistibly to the conclusion that the purpose was to secure revenue for the support of the state government. The local situation is shown in the opinion of the Supreme Court of Appeals of West Virginia in Finlayson vs. City of Shinnston, 168 S. E. 479, announced on March 7, 1933. The people of the state at the general election of 1932 adopted an amendment to the West Virginia Constitution, Article 10, Section 1, which provides "that the aggregate of taxes assessed in any one year" upon the several classes of property therein enumerated shall not be in excess of certain specified amounts applicable to said classes respectively; except that the Legislature may provide, by general law, for limited increases of maximum rates upon the vote of the people. Subsequently, it was found that direct taxes upon property, when limited in amount as prescribed by [fol. 505] the constitutional amendment, would not produce enough revenue to pay the interest on the bonded indebtedness of the state and create sinking funds for its retirement, and also to pay the running expenses of the government. In this situation the people of the city of Shinnston voted in favor of an additional bond issue for the improvement of their city water system, which would have necessitated an additional levy upon property over and above that permitted by the constitutional amendment; and the contention was made that the amendment pertains

only to taxes levied for general or current expenses and does not relate to levies imposed to meet the charges of a public debt. The Supreme Court of Appeals rejected this contention and ruled that all levies for governmental subdivisions of the state should come within the maxima authorized by the amendment, except as might be otherwise required by paramount law. The provisions of the Federal Constitution, forbidding the passage of any law impairing the obligation of contracts were not relevant, because the necessity for such legislation was not apparent.

Speaking of the financial condition of the state and local governments, Maxwell, President of the court, said:

"This court must take judicial notice of matters known of all men. Courts should take notice of whatever is or ought to be generally known, within the limits of their jurisdiction. 15 R. C. L. 1057. Therefore, we note that the burden of taxation in this state has reached the crushing point. It was upon that background that the legislature in the summer of 1932 submitted to the people of the state a proposed constitutional amendment whereof one of the basic purposes was to place a limitation on direct tax levies, and it was on the same background that the people of the state at the November election adopted the amendment."

"Taxes levied by the various tax levying bodies of the state have very generally increased by leaps and bounds within the last decade. And not only that, but the people themselves of many taxation units have authorized bond issues, the interest and sinking funds of which now add substantially to the burdens of taxation. The serious economic depression of the last three years has greatly accentuated the tax situation. The people have come to realize that a public spending program of exaggerated proportions, such [fol. 506] as came into being in the World War period and in the succeeding years of inflation bears heavily upon the people in a period of adversity."

"With these undesirable conditions existing, it must be considered that when the people of the state adopted a constitutional amendment providing that the aggregate of taxes assessed in any one year * * * shall not exceed the maximum levies prescribed by the amendment for different classes of property therein enumerated, the people

meant that such prescribed maximum levies should be in fact the outside limit, for all purposes, save only as such course might imperil the integrity of solemn obligations and thereby violate paramount law. We say this because the plain language aggregate of taxes means all the taxes. Simply that and nothing less. Such plain and unequivocal language leaves no room for interpretation."

* * * * * * *

"The court takes judicial notice that the legislature is now in session and that questions pertaining to the providing of additional sources of revenue through indirect taxation are receiving legislative attention. The court will not anticipate legislative failure in that particular."

In a concurring opinion, Hatcher, Judge, said:

"We must assume that the legislature gave due consideration to the reduced amount of revenues which would result from the restricted levies, and had in mind plans to supplement direct taxes with indirect taxation wherever necessary. The legislature must have foreseen that, in order for some governmental agencies to function after the adoption of the amendment, revenue in addition to the restricted levies would be imperative. The submission of the amendment to the people was in effect an assurance of the legislature that it would devise ways to replenish the shrunken treasuries which would follow the adoption. That assurance has been accepted, and we must presume that it will be fulfilled."

It was during the pendency of this case of state wide importance that the legislature considered and passed the Chain Store Act. It became a law without the approval of the Governor on March 8, 1933, the day after the decision just cited; and it was obviously intended, in view of the [fol. 507] new constitutional restriction upon direct taxes upon property, to provide another source of revenue by taxing the advantages of chain store organizations in accordance with the method which had met the approval of the Supreme Court of the United States in the Chain Store Tax cases.

The defendant, in its answer in the pending case, admits that the act is primarily a tax measure, but denies that it

has nothing to do with the exercise of the police power of the state, averring that it is the policy of the state, in the interest of the general welfare, to encourage individual ownership and operation of business undertakings. However, we are left to the terms of the act itself and to the circumstances under which it was passed as the only sources of information on the subject. In a similar situation it was held by the Supreme Court of the United States in Liggett Company vs. Lee, 288 U. S. 517, 535, that in the absence of legislative declaration or record proof, the court, in considering the Florida Chain Store Act, could not attribute to the legislature the purpose to suppress by taxation large corporate chains as a form of organization deemed inimical to the public interest. It had been suggested (288 U. S. 541, 585), that the chief aim of the act was to protect the individual, independently-owned, retail stores from the competition of chain stores by subjecting the latter to financial handicaps which might conceivably compel their withdrawal from the state; but the court, conceding, for the purpose of argument, that the legislature might distinguish between corporate owners and individuals, and again between small owners and large owners, said that it was not permitted to guess at any such undisclosed purpose in the minds of the law making body.

The same conclusion seems to be justified in this case, especially in view of the emergency with which the legislature was confronted. In any event, there is no reason to suppose that a special animosity exists against the particular kind of chain business, with which we have here to deal. The difficulty which the small store owner meets in competition with great national chains, and the hostility thereby engendered, doubtless gave rise to chain store taxation; but [fol. 508] there is no evidence that the feeling is intensified, if indeed it exists at all, with regard to the numerous gasoline and oil stations which oil companies of national scope have established and maintained in every secton of the country. Their establishment is a matter of comparatively recent date. It did not interfere with small businesses previously conducted by independent dealers; and the convenience of the large number of persons who travel by automobile is so greatly served by the wide distribution of service stations in various parts of the country that we cannot conclude that the public desires legislation which would result in their suppression.

The graduated classification under the West Virginia statute rests only on the number of stores in the chain, and we have to consider whether this classification is reasonable when it appears that the practical effect thereof is to exact heavy taxes from a particular industry out of all proportion to the value of the privilege enjoyed. Taxing statutes, which measure the taxes imposed with reference to the number or amount of certain factual differences, are of course well known, and classifications based thereon have been sustained. Thus in Louisville Gas Company vs. Coleman, 277 U. S. 32, where the court considered a state tax based upon the recording of mortgages, it was said (p. 38) that the state might take into consideration as an element in fixing the amount of the tax, the time within which the indebtedness was to be paid, for the privilege of recording a short time lien and that of recording a long time lien have different taxable values; in Dow vs. Beidelman, 125 U. S. 680, 690-1, a state statute was sustained which classified railroad corporations by the length of their lines, and fixed a different limit of the rate of passenger fares in each class, so that the rate was 3¢ per mile on railroads more than seventy-five miles long, 5¢ for lines between fifteen and seventy-five miles, and 8¢ for lines 15 miles or less; in Magoun vs. Illinois Trust & Svgs. Bank, 170 U. S. 283, an inheritance tax law of Illinois was sustained which imposed a graduated tax on legacies, so that, for instance, one who received a legacy of $10,000 paid 3%, and one receiving a legacy in excess of $10,000 paid 4%; in Clark vs. Titusville, [fol. 509] 184 U. S. 329, a license tax was sustained which provided that persons in different occupations should pay different amounts, and which classified persons in the same occupation by the maximum and minimum amount of sales; and in Metropolis Theatre Co. vs. Chicago, 228 U. S. 61, there was sustained a classification of theatres for license fee, graded according to prices of admission, since it was held that there was a natural relation between the price of admission and the revenue, and some advantage inhering therein. In these cases, however, there was some reasonable relation between the distinction based on numbers or amounts and the object of the legislation.

The Chain Store Tax cases in the Supreme Court did not involve a decision of the particular question with which we are now concerned, for the classification sustained therein

did not rest merely upon numbers of stores. It is true that in Tax Commissioners vs. Jackson, 283 U. S. 527, the proof showed that the mere addition of a new unit or store to an existing chain does not increase the sales more than arithmetically, and the volume of business of other stores in the chain is not thereby increased, and it was demonstrated that the tax sustained bore more heavily upon chain stores than upon single department stores doing a large business. (pp. 534-5). In answering these considerations the court said that in determining how it shall classify occupations for taxation, the legislature is not confined merely to the value of the business taxed, but may have regard to other elements. The court then outlined the advantages which chain stores alone enjoy, such as concentration upon one kind of stores in many neighborhoods, greater specialization in management and methods, as in massed buying for units selling similar goods, and intensive selling in a single line of business; and said (pp. 541-2) that the trial court had fallen into the error of assuming that the distinction between the business of a chain store corporation and that of other sorts of stores was solely one of ownership. Thus it was demonstrated that the classification did not rest merely upon the number of stores under one ownership, as was contended by the taxpayer and found as a fact in the dissenting opinion (p. 543).

[fol. 510] In the case of Liggett vs. Lee, 288 U. S. 517, 532, the court, speaking of its earlier decision in Tax Commissioners vs. Jackson, 283 U. S. 532, said:

"The decision in the Jackson case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store."

* * * * * * *

"As we have held, gradation of the tax, according to the number of units operated, cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a

privilege and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary."

However, it was held that a statute, which increased the license fee for all stores in a chain if any of them were located in different counties, was lacking in any reasonable basis of classification since the adoption of a county line could have no reference either to density of population, congregation of the buying public, or any other factor bearing upon the choice of a business site. The court, also, said:

"It is evident, however, that the mere spatial relation between the store and a county line, cannot, in and of itself, affect the value of the privilege enjoyed. The appellees fail to show how the fact that the new place of business lies in another county increases the advantage over that to accrue from a location within the same county. The classification is solely of different chains, and the difference between them consists neither in number, size, surrounding population, nor in any factor having a conceivable relation to the privilege enjoyed."

We take this language to reiterate the holding that chain stores are taxable as such because they possess certain [fol. 511] characteristics not enjoyed by other forms of merchandising, and that in measuring the amount of the tax, it is not per se arbitrary or unreasonable to increase the tax on all the stores in a chain when a new store is added. Nevertheless it is also shown, in accordance with the general principle which forbids arbitrary or unreasonable classification for purposes of taxation, that a classification of different chains may be subject to condemnation if the difference between them has no relation to the privilege enjoyed.

Does it follow that a classification of chain store organizations is reasonable which has regard merely to the number of units in a chain, no matter how disproportionate the burden may be in its practical effect when the tax is applied to different members of the group? We think that this cannot be so, while it is settled that an occupational tax need not be measured merely by the value of the privilege enjoyed, it has never been said that in determining whether a particular tax is unreasonable or arbitrary, all

considerations of value may be excluded. On the contrary, it was unanimously held in Air Way Electric Appliance Corporation vs. Day, 266 U. S. 71, 83, that a state tax could not be sustained which fixed the annual fee payable by a foreign corporation for the privilege of exercising its franchises in the state with reference to the number of its shares of authorized common stock, the court saying that while such a charge need not be measured by the value of the privilege for which it was imposed, some relation to such value is a reasonable requirement. The Florida Chain Tax law, considered by the court in Liggett vs. Lee, 288 U. S. 517, was condemned because the classification did not take into consideration any factor having a conceivable relation to the privilege enjoyed. See, also, Metropolis Theater Co. vs. Chicago, 228 U. S. 61, 64; Ohio Oil Co. vs. Conway, 281 U. S. 146, 159; Louisville Gas Co. vs. Coleman, 277 U. S. 32, 38, in all of which the materiality of value as an element entering into the reasonableness of a classification is noticed.

In applying these rules, we must take into consideration the factual situation, for the constitutionality of a taxing statute must be tested by its practical operation and the effect of its enforcement upon the taxpayer. Weaver vs. Palmer Bros., 270 U. S. 402; Quaker City Cab Co. vs. [fol. 512] Pennsylvania, 277 U. S. 389, 401; Panhandle Oil Co. vs. Mississippi, 277 U. S. 218; Air Way Corporation vs. Day, 266 U. S. 71, 82. The effect of the West Virginia statute, as we have seen, is to place by far the greater part of the burden of the tax upon corporations maintaining chains of gasoline stations; general commodity chains do a very much larger volume of business, but pay a very much smaller tax than the gasoline chains; and the average tax, per unit, upon gasoline stations is so large that it approximates the average net earnings thereof, whereas the volume of business of the general commodity chains is so much greater that the smaller tax applicable to them is not a matter of great significance. Two factors of much importance bearing upon the reasonableness of the tax are (1) that the general commodity chains enjoy all of the advantages of chain store organizations equally with chains of gasoline stations; and (2) that approximately 10% of the plaintiff's gasoline stations, which do the largest and most profitable business in populous centers, do very much

less business than the stores in general commodity chains, while approximately 90% of the stations scattered throughout the state do so small a business that little or no profit is left after the tax is paid. In short, since the amount of the tax is determined only by the number of stores, the addition of new stations, taxed at the highest rate fixed by the statute, tends not to increase but to decrease the profits of the whole business; and the consequence is that as between members of the group composed of chain store organizations, the differences, by which the gradations of the tax are fixed, rest solely upon ownership.

In Tax Commissioners vs. Jackson, supra, the comparison set up in the opinion of the court was between single stores and chains of stores, and the differences of business methods being shown, it was held that the discrimination in the statute did not solely rest upon ownership. Here, the comparison is between members of chain organizations pursuing like methods of business common to the class. In Liggett Company vs. Lee, supra, the highest rate of tax was $50 per store, and the effect of the operation thereof upon a large number of stores in a chain doing a relatively small amount of business per unit was not considered or [fol. 513] compared with the effect of such a tax upon a chain doing a large volume of business in a small number of stores. There was no evidence on the point and it was assumed that the mere addition of a store to a chain was a privilege of taxable value. In the present case, the highest rate of tax is $250 per store, and the total amount of the tax in every instance is fixed solely by the number of units without any reference to the amount of business done or profit gained. There results, as the evidence shows, the imposition upon one kind of chain organization of a heavy burden of taxation which has no reasonable relation to the advantages conferred; for other businesses, enjoying all of the benefits of chain organization, and receiving a much greater revenue, pay a much smaller tax. So it must be said, when the practical effect of the statute is considered, that the sub-division of chain organizations into groups does not bear a fair and substantial relation to the object of the legislature; that all members of the class of chain organizations, similarly situated, are not taxed alike, and that the equal protection of the law guaranteed by the Fourteenth Amendment is denied.

It has also been urged upon us that the Act is unconstitutional for the additional reason that it violates the due process clause of the Fourteenth Amendment. The facts and figures, which we have reviewed tend very strongly to indicate that in effect the tax, as applied, absorbs substantially the entire profits of the efficiently conducted business of the plaintiff, although in terms the tax is a license measure for the privilege of doing the business; and it is pointed out that unlike the gallonage tax, the chain store tax is of such a nature that it cannot be directly passed on to the consumer. So it is contended that the tax is in its essence confiscatory, and is therefore in violation of the due process clause of the Fourteenth Amendment. We feel that there is force in this argument, but in view of the grounds herein elsewhere expressed with regard to the invalidity of the legislation when applied to the plaintiff's situation, we find it unnecessary to rest the decision upon this point.

The contentions that the Act violates the uniformity pro- [fol. 514] vision of the Constitution of West Virginia, and that when properly construed, the Act does not apply to the plaintiff's places of business, are considered in the following opinion in which Judge Chestnut speaks for the court.

IN UNITED STATES DISTRICT COURT

CONCURRING OPINION

CHESNUT, District Judge:

At the threshold of the case lies a point of construction. Does the definition of a "store" in the Act cover the gasoline "filling" or "service" stations conducted by the plaintiff and described in the stipulation? It is unnecessary to repeat the description in any detail as it is a familiar city or roadside spectacle well known to all at this time. Under a substantially similar statute it has very recently been decided in Indiana (Midwestern Petroleum Corp. v. State Board, Ind. Supreme Co. Dec. 15, 1933) in the affirmative; while in a very fully considered opinion (adhered to on rehearing) it has been decided in the negative in Wisconsin (Wadhams Oil Co. v. Wisconsin, 245 N. W. 646; 246 N. W. 687). In the former case the decision is based almost entirely on the ground that the word "store" in its diction-

ary sense is literally broad enough to cover the typical gasoline or service station because it comprehends a place where gasoline and similar automobile necessities, articles of merchandise, are sold at retail. In the latter case there was applied the well known principle of statutory construction that "as a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it appears from the context or otherwise that they were used in a different sense." 2 Lewis' Sutherland Statutory Construction (2d Ed.) sec. 390; Old Colony R. R. v. Commissioner, 284 U. S. 552, 560. It was correctly said by the Wisconsin Court that " in common language a filling station is not referred to as a store, or a mercantile establishment where goods, wares or merchandise are sold or offered for sale at retail". A comparison of the reasoning in the two opinions leads us to the conclusion that the sounder rule as applied to this case is that adopted by the Wisconsin Court. The dictionary definition of "store" is clearly too broad to be here controlling. It was well said by the Wisconsin Court (246 N. W. 688):

[fol. 515] "There are many places where goods, wares, and merchandise of some kind are kept for sale which would not be understood, according to the common and approved usage of the language, to be stores or mercantile establishments. Among these might be enumerated tailor shops, shoe-shining parlors, wood yards, lumber yards, coal yards, brick yards, stone quarries, news stands, fruit stands, flower stands, cheese factories, restaurants, hotels, and no doubt others. * * * The same argument which supports the conclusion reached in the brief that a gasoline filling station is a store would support the conclusion that a brick yard is a store. It is a place where goods, wares, and merchandise are kept for sale at retail. No one could reasonably argue that the Legislature used the term 'store or mercantile establishment' in any such wide, comprehensive and unrestricted sense. No one has yet pointed out that according to the common and approved usage of the language the term 'store' or 'mercantile establishment' has ever been applied to a gasoline filling station."

There are other, and, in our view, even more persuasive considerations which lead to the same conclusion. We are here construing a statute which is familiarly known as a

"chain store act", a type of legislation which now exists in some nineteen states and in recent years has been considered in numerous judicial decisions. The essential principle of these Acts is to impose taxation in the form of license fees for the privilege of conducting stores, on a graduated scale, dependent upon the number of units or stores operated or controlled under one management. The type of business enterprise affected by such statutes is well identified in the public mind, but it is reasonably clear that the characteristics which serve to classify "chain stores" as such, as distinct from ordinary stores, do not apply to various other business enterprises involving control of multiple units. Thus a chain of hotels in one or more states has a similar feature of unified ownership or management but has never been thought to be within the provision of these chain store acts although literally also they are places at [fol. 516] which goods, wares and merchandise are sold. Similarly it may be said that filling stations meet the needs of the touring automobile in the same general way that hotels and restaurants provide necessities for the traveler. The roadside filling or service station is the modern substitute for the livery stable in connection with an inn or tavern in days of travel by stagecoach. The dominant characteristic of the business is the "filling" of automobiles with gasoline, oil and water, and the rendering of "service" to the motorist—hence the name which aptly describes the business. Such transactions are in public thought quite distinct from the purchase of goods at an ordinary store.

Probably the greatest objection to chain stores is their tendency to eliminate the individual storekeeper, an occupation of long standing; but this cannot be said to be true of the chain of filling stations which is itself a feature of a new industry, filling a new public need, and being itself as much a pioneer in the new development of the automobile and petroleum industry as is the single independent station.

The filling or service station is thoroughly identified in the popular mind as a thing which is sui generis and the gasoline industry, including particularly the sale of gasoline at retail, has been the subject of separate legislation, it is safe to say, in every state of the Union. Legislation affecting chain stores and legislation affecting service stations are separate and distince subjects matter each of which respectively has had its own course and, so far as we are

advised, they have followed parallel lines which do not intersect in common thought and understanding. There has been nobody of public thought or literature coming to our attention which has identified the chain of filling stations with the characteristic features commonly associated with the popular conception of chain stores. And the somewhat elaborate stipulation of facts in the case very clearly leads to the conclusion that the combined characteristics which feature the typical chain store system and which have served [fol. 517] as a basis for special classification for purposes of taxation do not inhere in multiple ownership or control of filling stations as compared with individual or independent ownership and operation of a single filling station. Therefore in searching for the meaning of the legislative definition of the word "store" as used in this "Chain Store Act", it is not reasonable, in our opinion, to determine that the typical filling or service station is a store as the term was defined in this "Chain Store Act", in the absence of language which plainly indicates from its context that such stations were intended to be included.

Taxing statutes, especially when they include highly penal provisions (as does this one) are to be construed in favor of and not against the taxpayer. Gould v. Gould, 245 U. S. 151; Old Colony R. R. v. Commissioner, 284 U. S. 552, 561; Alyea-Nichols Co. v. United States, 12 Fed. (2d) 998.

The State of West Virginia, in common with other states of the Union, has legislated particularly and expressly with regard to the licensing and taxation of filling stations as well as the gasoline sold therefrom. Article 14, ch. 11 of the Code of West Virginia provides in substance that distributors of gasoline shall pay an annual license tax of $5.00 for "each *distributing* station or place of business" from which gasoline is sold for re-sale or distribution, and an annual license tax of $1.00 "for each filling station or place of business" from which gasoline is sold at retail. It is to be noted that here where the Legislature was plainly dealing with the particular subject matter of filling stations it appropriately used precise words which can leave no doubt as to the meaning, and in view of this precise particularity it is not reasonable to construe the general language of the "Chain Store Act", relating to a subject matter of different popular conception, to be inclusive of the particular subject matter so precisely described in other

legislation. In accordance with the general presumption against double taxation, it has been held as a matter of statutory construction, in a number of cases, that where the particular business or occupation has been specifically dealt with in legislation by way of license fees or taxation, more [fol. 518] general statutes which literally might be inclusive are not applicable. Gulf Refining Co. v. Chattanooga, 136 Tenn. 505; Piedmont Oil Co. v. Kentucky, 165 Tenn. 375; City of Newport v. Fitzer, 131 Ky. 544; Atlantic City v. Hemsley, 76 N. J. L. 354; Bell v. Watson, 3 Lea (Tenn.) 328; Walker v. New Orleans, 31 La. Ann. 828.

In West Virginia the gallonage tax on gasoline is 4¢. While in practical effect this tax is passed on to the consumer it nevertheless is a tax primarily on the vendor and furnishes a very material part of the whole of the state revenues, as is true in many other states. A similar situation existed in Wisconsin and was well expressed in Wadhams Oil Co. v. Wisconsin, 246 N. W. 687, as follows:

"Considering this (Chain Store Statute) generally in connection with other statutes relating to taxes, the Legislature may well have thought that having already imposed a sales tax of 5¢ a gallon upon the use of gasoline by the operators of motor vehicles, approximately 33⅓ per cent ad valorem, the business was already bearing its fair share of the tax burden."

The essential difference between filling stations and stores generally is not only well marked in popular understanding but has been judicially expressed in recent cases by the courts. It is said that in at least ten of these Chain Store Acts filling stations have been expressly excluded, and in some cases the contention has been submitted that the exclusion of filling stations from the incidence of general chain store legislation vitiates the Act as its constitutional requirement of equality of operation. But this contention has been rejected. In Southern Grocery Stores v. South Carolina Tax Commission, 55 Fed. (2d) 931, 933, Circuit Judge Parker said in dealing with the South Carolina Chain Store tax:

"There can be no question, we think, but that the exemption of gasoline filling stations from the tax rests upon a

reasonable classification. Such stations as a general rule sell only gasoline and other articles of merchandise upon which the state collects a heavy excise tax, and it was doubtless for this reason that they were exempted from the tax [fol. 519] in question. Furthermore, such filling stations are quite distinct from ordinary stores or mercantile establishments. Of course, if the operator of a filling station should operate a store or mercantile establishment in connection therewith, such stores would unquestionably be subject to the tax prescribed by the statute."

And dealing with a similar situation under the Florida Act the Supreme Court in Liggett v. Lee, 288 U. S. 517, 538, said:

"but in view of the imposition of taxes on the operation of filling stations by other acts, pursuant to the legislature's power of classification, we cannot declare their exemption from the tax laid by the chain store act offensive to the guaranties of the Fourteenth Amendment."

The stipulation of facts discloses that the total possible annual revenue to the state from all chain stores subject to the Act, if filling stations are included, is $569,693.06, and of this aggregate 85.3% will be payable by the operators of filling stations. In these circumstances it seems quite improbable that the Legislature could have intended to make the general word "stores" applicable to the very particular and distinct kind of stores, if they be stores at all, known as filling stations or service stations, without more particularity of description.

Another persuasive consideration for the construction which excludes a filling station from the scope of the Act is that a grave question of the constitutionality of the Act (both federal and state) is thereby avoided. The application of the Act to the Plaintiff becomes exceedingly onerous. There is force in the plaintiff's contention that it practically confiscates the value of the plaintiff's property by absorbing under the form of a license tax for privilege to do the business, the whole net profits of the business, and this not by virtue of faulty or inefficient management but from the very nature of the business itself. Filling stations to be of service to the public should be accessible to

the motorist. This requires a large number of individual units in different locations throughout the state. If left [fol. 520] to purely individual management there is likely to be a lack of co-ordination in location in the interests of the travelling public. Similarity of service both as to the kind of automobile supplies and accessories and trained attendants resulting from unified management is desirable for the public convenience. The economic result from the standpoint of the filling station, therefore, means a large number of small stations conveniently located. The possible volume of business for most of these stations is necessarily limited in amount. It is therefore natural to find, as is shown by the stipulation of facts, that the average net profit per station does not exceed a few hundred dollars a year and yet this tax as applied to the Standard Oil Company, the plaintiff in this case, requires the payment of a license tax of about $240 per station, thus exceeding the annual net profits of the whole business. The result will be obvious—either the abandonment of the stations, thus resulting in a detriment to the public and incidentally a cessation of the revenue, or some entire re-organization of the business which may be less convenient to the public.

The objections to the validity of the Act, under the 14th Amendment to the federal constitution, if applied to filling stations, are fully stated in Judge Soper's opinion for the Court. In addition thereto and separately therefrom the plaintiff's counsel also contends that the Act, if applied to filling stations, violates the Constitution of the State of West Virginia as amended November 8, 1932, the relevant portion of which reads as follows:

"Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. * * * The Legislature shall have authority to tax privileges, franchises and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof," etc.

[fol. 521] It is said that the necessary construction of the above provision is to limit the power of the Legislature "to classify and graduate the tax" to incomes and to exclude the power with reference to privileges and franchises

on the familiar principle of statutory construction expressio unius est exclusio alterius. (Note 1.)

Prior to November 8, 1932, the West Virginia Constitution in Section 1 of Article 10, empowered the Legislature "to tax, by uniform and equal laws, all privileges and franchises of persons and corporations". It is clear from the West Virginia decisions that under the latter constitutional provision occupations could be classified for purposes of taxation. In Sperry & Hutchinson v. Melton, 69 W. Va. 124, 125, 127, a license tax of $500 for engaging in the business of trading stamps was upheld, the court saying: "Of course there must be reasonable classification and no unjust discrimination. The tax must be equal and [fol. 522] uniform in relation to all persons of the same class." (See also Sperry & Hutchinson v. Blue (C. C. A. 4) 202 Fed. 82.) And in Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 278, a tax of a fixed percentage of gross receipts was upheld. And in Pipe Line Co. v. Hallanan, 87 W. Va. 396, 400, 411, a tax of two cents per barrel for crude oil transported by pipe line in the state with an exemption if the transportation by the entire system of the particular pipe line company was less in distance than ten miles, was upheld as sufficiently equal and uniform. It seems clear from these cases that the Legislature of West Virginia was not prevented under the earlier constitutional provision from classifying privileges and occupations, nor was it prevented from imposing a graduated tax

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NOTE 1: Comparison is invited between the above quoted provision of the West Virginia Constitution and similar subject matter as expressed in Constitution of South Dakota, as amended in November 1918, reading as follows:

"The legislature is empowered to impose taxes upon incomes and occupations, and the tax upon incomes may be graduated and progressive and reasonable exemptions may be provided;"

and also similar subject matter in sec. 1 of Article 8, of the Wisconsin Constitution reading:

"Taxes may also be imposed on income, privileges and occupations, which tax may be graduated and progressive, and reasonable exemptions may be provided."

in simple proportion to value or volume of business. It is contended for the plaintiff that the effect of the constitutional amendment is to now prohibit even simply graduated taxes on privileges and occupations, and an extended argument is submitted in support thereof; but if this is not so, then great reliance is placed upon the distinction between a simply graduated tax which varies directly in proportion to the amount of gross receipts of a business, and a progressively graduated tax which is stepped up in rate as the volume of business or number of units subject to the tax increases. And it is earnestly contended by plaintiff's counsel that the latter form of tax violates the state constitutional requirement as to uniformity, even though it does not run counter to the federal constitutional provision as to equality (Jackson v. State Board, 283 U. S. 527) (Note 2) and reference is made to many

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[fol. 523] NOTE 2: The Jackson case did not involve consideration of a state constitutional requirement as to uniformity of taxation because the Indiana court had held its constitutional provision as to uniformity not applicable to occupation or license taxes. 283 U. S. 542. And a similar situation existed in Liggett v. Lee, 288 U. S. 517. While state taxes on occupations and privileges, on the simply graduated basis, are not unusual, and have been held generally free from constitutional objection in West Virginia (under the earlier constitutional provision) as well as elsewhere (37 C. J. 197 s. 51) instances of progressively graduated taxes applicable to occupations are comparatively rare, with the exception of the chain store taxing acts now existing in many states.

In the following cases the uniformity clause of state constitutions was held inapplicable to chain store license tax acts: Liggett v. Amos (Fla.), 141 S. 153, 157; Penny Stores, Inc., v. Mitchell (D. C. Miss.), 59 Fed. (2d) 789, 792; Board of Tax Comm. v. Jackson, 283 U. S. 527, 542; Commonwealth v. Bibee Grocery Co., 153 Va. 935, 151 S. E. 293. In North Carolina and Kentucky the uniformity provision was held applicable, North Carolina sustaining a simply graduated tax (Gt. Atl. & Pac. Tea Co. v. Maxwell, 199 N. C. 433), and Kentucky sustaining a pro-

state court decisions which have adjudicated the invalidity of progressively graduated income and inheritance taxes under particular state constitutional requirements as to uniformity. (Note 3.) However, the analogy between income and occupation taxes is not necessarily absolute. In general it may be said that the tendency of the judicial decisions, in dealing with license taxes is to make no clear cut distinction between the uniformity and equality provisions of the state constitutions, and therefore a tax valid in respect to equality is not invalid as lacking in uniformity, and conversely an unequal tax, because based on an unreasonable classification is also lacking in uniformity. Thus, while there may be no essential difference in legal principle between simple and progressively graduated taxes with respect to uniformity or equality, yet if the progressive rates of the tax bear no reasonable relation to the subject matter, or become so oppressive in practical application as to be confiscatory, the tax will also be invalid as lacking in uniformity. (See Pipe Line Co. v. Hallanan, 87 W. V. 396, 411, 413). In the last an-

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gressively graduated tax, (Moore v. State Board of Charities and Corrections, 239 Ky. 729). A simply graduated tax has, however, been invalidated under the same constitutional provision where the owners of five stores are exempted, and the owners of more than five are taxed for the first five as well as the excess. F. W. Woolworth Co. v. Harrison (Ga. 1931), 156 S. E. 904; Gt. Atl. & Pac. Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701. There seems to be no West Virginia decision dealing with a progressively graduated tax on occupation; so far as we are advised the present Act now under consideration is the first legislation of that kind in the state.

[fol. 524] Note 3: See the following cases holding such Acts unconstitutional: In re Opinions of Justices, 82 N. H. 561; (income tax); Williams v. State, 81 N. H. 341, 351, (inheritance tax); Cope's Estate, 191 Pa. St. 1, (inheritance tax); State ex rel. Garth v. Switzler, 143 Mo. 287, (succession tax); Bachrach v. Nelson, 349 Ill. 579, (income tax); and see Re Harkness, 83 Okla. 107 (inheritance tax). Contra, Standard Lumber Co. v. Pierce, 112 Ore. 314; Featherstone v. Norman, (Ga.) 153 S. E. 58.

alysis, therefore, the question presented under the state constitution as to uniformity is not substantially different from that under the fourteenth amendment to the federal constitution, as to equality and due process; unless as the plaintiff contends the amended constitution of West Virginia prohibits any graduation of all taxes on privileges and occupation. And on this particular question we deem it unnecessary to express a definite opinion in the absence of any decision by the West Virginia court on its amended constitutional provision, especially as our disposition of the case on other grounds does not imperatively demand such a decision. Southern Grocery Co. v. South Carolina Tax Commission, (D. C. S. C.) 55 Fed. (2d) 931, 933.

In opposition to the construction of the Act, that it does not apply to filling stations, the defendant stresses the apparent intention of the Legislature evidenced by the defeat in one of the two Houses of the West Virginia Legis- [fol. 525] lature, of an amendment expressly excluding filling stations from the Act. The implication from this action is by no means of clear import. State v. Lancashire Fire Ins. Co. 66 Ark. 466; Dist. of Columbia v. Washington Market Co. 3 MacArth. (D. C.) 559 (affirmed 108 U. S. 243); Murdock v. Memphis, 20 Wall. 590, 618. Apart from this we regard the question of construction of the language as written sufficiently clear and certain to render unnecessary resort to the legislative history of this Act. State v. Harden, 62 W. Va. 313, 330, 349; U. S. v. Shreveport Grain & Elevator Co. 287 U. S. 77, 83; R. R. Comm. of Wisc. v. Chicago B. & Q. R. Co. 257 U. S. 563, 589; Kelleher v. French, 22 Fed. (2d) 341, 346.

It is also contended by the defendant that some of the service stations sell automobile tires and other accessories. But the stipulation of facts shows that the total amount of sales of such articles is comparatively small, being approximately 6.3% of the total receipts. It is apparent also from the facts that sales of these articles are incidental only and are substantially for service to automobiles en route rather than the vending of merchandise in the usual way. This small incidental sale of articles of merchandise is not sufficient in our opinion to convert a service station, otherwise not subject to the Act, into a store within the Act any more than the incidental sale of cigars and newspapers and flowers in the lobby of a hotel makes the latter a store as

distinct from a hotel or restaurant. It is the dominant nature of the business which characterizes it for purposes of taxation. See Fisk Tire & Rubber Co. v. Hinson, 168 Ark. 418; Cesar v. Virgin, 207 Ala. 148; Swanson v. DeVine, 48 Utah 1. Of course, as was pointed out in the Wadhams Oil Company case, it may become a question of fact with regard to any particular station whether by reason of the extent of its sale of accessories or otherwise its dominant characteristic has become that of a store rather than a mere service station.

[fol. 526] We conclude that the tax of $240,173.50, imposed upon the plaintiff corporation and paid by it under protest, was improperly collected, and that it is entitled to a decree whereby the defendant will be perpetually enjoined and restrained from paying said money into the State Treasury of West Virginia, and will be ordered and directed to account for and pay over said sum to the plaintiff.

[fols. 527-529] (Sections of the Act of the State Legislature of West Virginia passed on March 8, 1933, to be set out in the margin as mentioned on page 3 of this opinion, omtited, printed side page 52, ante.)

[fol. 530] In United States District Court

[Title omitted]

Findings of Fact—Filed March 1, 1934

The facts in this case were stipulated by the parties and the stipulation permits a reference to the agreed facts in the three companion cases brought in this court against the State Tax Commissioner of West Virginia by the Gulf Refining Company, the Ashland Refining Company and the Sinclair Refining Company respectively. References herein are made to the printed stipulation in the case brought by the Standard Oil Company. As the faces are stipulated, it is unnecessary to repeat them as findings of fact; but certain of them have special importance in relation to the discussion in the opinion of the court, and are therefore summarized as follows:

The practical effect of the West Virginia Chain Store Tax is shown by the great percentage of the whole paid

by the oil companies maintaining gasoline stations in the state such as the plaintiff. The total number of stores, including gasoline stations in the state for which licenses were issued under the Act in 1933, was 15,210, and the total fees paid amounted to $569,693. Single stores in the number of 10,722 paid $26,723, while multiple stores, in the number of 4,488, paid $542,970. Of the total, 4,453 gasoline stations paid $486,168 or 85.3%, and of this number, 2,453 chain gasoline stations paid $481,168 or 84.46% of the total tax, while 2,000 single stations paid $5,000. Five oil companies, including the plaintiff, paid $476,171 or [fol. 531] 83.5%, and the plaintiff alone paid $240,173 or 42.16% of the total tax. These striking results were reached because the oil companies greatly exceed all other businesses in the number of units at which their products are sold, and the graded tax is sharply increased from $5 a store, if not more than five stores are maintained, to $250 per store if more than seventy-five are maintained.

Confining the comparison between chain gasoline stations, on the one hand, and general chain commodity stores on the other, it appears that in 1932, the last year for which complete figures are available, 2,453 gasoline stations, in chains of 2 or more, did an aggregate business of $15,198,638 or 4.6% of the total business and would have paid $481,168 or 84.46% of the total tax had the law then been in effect, while 1889 general chain commodity stores, doing a business of $75,454,257, or 22.9% of the total, would have paid only $60,785 or 10.7% of the total tax. (S11.) The following table compares the gross business done and the tax paid in West Virginia by well known chain store organizations of national scope, operating many stores throughout the United States, and enjoying all the advantages of chain store organization, with the business done and tax paid by the Standard Oil Company of New Jersey, the plaintiff in this case. The table shows the relatively large gross business and the low tax per store of the corporations in the first category when compared with the relatively small gross business and high tax per store of the second. (S14, 15, 19, 78, 87.) The year selected is 1932 and the indicated tax is computed on the number of stores in the state in that year.

[fol. 532]

	No. of stores or stations	Average chain store tax	Total chain store tax	Average gross revenue per store	Total gross revenue	
Sears Roebuck & Company....	4	$4.75	$19.00	$140,715.	$562,861.00	
Montgomery Ward Co.....	7	6.50	45.50	151,154.	1,058,083.00	
S. S. Kresge Co.....	12	9.83	118.00	140,428.	1,685,141.00	
F. W. Woolworth Co.....	21	17.50	367.50	84,698.	1,778,671.00	
Kroger Grocery & Baking Co..	94	132.64	12,469.00	58,503.	5,499,343.00	
Great A. & P. Tea Co.....	198	194.55	38,521.00	62,400.	12,455,017.00	
Standard Oil Company:						
Company owned stations..	98	240.51	23,569.98	26,822.	2,628,615.00	
All gasoline stations.....	1046	240.51	251,573.46	6,145.98	6,428,701.00	(including tires, etc.) (587)

NOTE: The average revenue gross per station is calculated with the bulk plants excluded. If they are included, the amount would be reduced.

[fol. 533] Gross Business and Net Earnings of Stations of Standard Oil Company

The stipulation of the parties contains a number of calculations and tables purporting to show the gross revenue and net earnings of the plaintiff company at its service stations in West Virginia. The following table (S 44-5) for the year 1932 shows the relatively large amount of business per station of the company owned stations as compared with the agency stations, and the total tax that would have been payable by each if the law had then been in effect:

	No. of stations	Gross revenue	Gross revenue per station	Total tax
Company owned.....	98	$2,628,615	$26,822	$23,569
Agency	948	3,690,397	3,892	228,003

The following table shows the gross revenues and net earnings of the 948 agency stations in 1932 when classified according to the annual gallonage (B251) (018):

[fol. 534]

Table No. 6

Gross Revenue and Net Earnings to Plaintiff from Sale of Petroleum Products at Leased Outlets and Vending Privilege Outlets (Agency Stations) Grouped and Ranked According to Gallons of Motor Fuel Sold Calendar Year 1932

Group No.	Annual gallonage classificaton	No. outlets in group	Total gross revenue	Total store tax for group	Total net earnings	Profit or loss after payment store tax		Average gross revenue per outlet by groups	Average store tax per outlet	Average net earnings per outlet by groups	Profit or loss per outlet after deducting store tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	319	$307,080.18	$76,722.69	$4,384.00	$.....	$72,338.69	$962.63	$240.51	$13.74	$.....	266.77
2	10— 20,000	247	637,075.07	59,405.97	12,672.63	.....	46,733.34	2,579.25	240.51	51.30	.....	189.21
3	20— 30,000	155	681,360.60	37,279.05	17,828.96	.....	19,450.09	4,395.22	240.51	115.02	.....	125.49
4	30— 40,000	96	586,096.07	23,088.96	15,016.10	.....	8,072.86	6,105.16	240.51	156.42	.....	84.09
5	40— 50,000	56	441,803.19	13,468.56	10,261.98	.....	3,206.58	7,907.19	240.51	183.24	.....	57.27
6	50— 60,000	22	211,534.59	5,291.22	3,007.07	.....	2,204.15	9,615.20	240.51	136.68	.....	103.83
7	60— 70,000	23	267,398.76	5,531.73	5,926.27	394.54	.....	11,626.03	240.51	257.56	17.05	.....
8	70—100,000	16	236,816.12	3,848.16	4,217.99	369.83	.....	14,801.00	240.51	263.62	23.11	.....
9	over 100,000	14	321,232.44	3,367.14	11,770.60	8,403.46	.....	22,902.31	240.51	840.75	600.24	.....
Totals		948	$3,690,397.02	$228,003.48	$85,085.60	$9,167.83	$152,085.71					
						Net Loss..	$142,917.88					

Average gross revenue per outlet, 948 outlets combined, 1932.....	$3,892.82
Average net earnings per outlet, 948 outlets combined, 1932....	$89.75

	For 948 outlets	Per outlet
Chain store tax based on computed average tax for 1109 units in 1932.....	$228,003.48	$240.51
Net earnings.....	$85,085.60	89.75
Payment of chain store tax out of capital.....	$142,917.88	$150.76

[fol. 535] The average net earnings of the company owned stations for the year 1930, 1931, 1932 and the first eight months of 1933 were as follows (S19): The average net earnings in 1930 for 105 company owned stations was $3008.98 per station, in 1931 for 96 such stations $3641.25 per station, in 1932 for 98 such stations $1782.78 per station, and the first eight months of 1933 for 94 such stations $109.72 per station, exclusive of the chain store tax. The company's investment in these stations as of December 31, 1932, was $2,693,519.

The company does not keep separate profit and loss statements for each of its agency stations (leased and vending privilege outlets), because the cost of auditing the accounts of so large a number of stations would be onerous; but the average profit and loss was ascertained from the net earnings of 124 of said outlets in 1932, selected with due regard to the volume of business and freight differentials, as a representative cross section of all of the outlets in the state. The figures for these outlets were taken from the company's books and records; the proceeds of the sales were ascertained, and therefrom were deducted the agents' commissions, rent, motor fuel taxes, cost of products billed by the refinery, with freight and all general overhead and delivery charges. The difference reflected the net earnings, which were then reduced to a weighted profit per gallon, and this figure was applied to the gallonage sold in each of the remaining outlets. The figures for 1931 and 1933 were obtained by relating the spread (difference between retail selling price and refinery billing price), and the operating expenses for these years respectively, to those of 1932. It was found that the average net earnings in 1931 for 815 agency stations was $173.85 per station, in 1932 for 948 such stations was $89.75 per station, and in the first six months of 1933 there was an average net loss for 856 such stations of $62.97 per station, excluding the chain store tax.

The following table gives a summary of the net earnings [fol. 536] of all the West Virginia stations of Standard Oil Company for 1931, 1932 and six months of 1933 (S87).

Average Net Earnings Per Station

	1931	1932	Six months 1933
Excluding bulk plants	$539.24	$248.37	$94.39*
Including bulk plants	496.71	234.26	89.31*
Average chain store tax	239.29	240.51	119.72
Total net earnings	$491,250.88	$259,797.60	$89,581.45*
Total tax	$236,666.50	266,726.50	120,086.75

*Loss.

In considering these figures, it should be noticed that notwithstanding the general bad business conditions prevalent throughout the country, the business for the year 1931 in volume was in excess of that both in previous and subsequent years. In 1932 the volume was also in excess of any prior year, except 1931. The gasoline gallonage tax receipts of the state, as shown by the reports of the State Tax Commissioner, indicate the following annual receipts from 1927 to 1933:

1927	$3,103,862
1928	4,021,854
1929	4,465,129
1930	5,154,598
1931	5,615,469
1932	5,489,867
1933 (six months)	4,826,635

[fol. 537] Net Earnings of Company Owned Stations and of Agency Stations

The net earnings for the agency stations as a whole, and also as classified with reference to the amount of business done, are shown in the table set out above for the year 1932. In that year the total profit, without considering the chain store tax, was $85,085, but if the tax had been deducted, there would have been a net loss of $142,917. It is noticeable in considering this table that of the total of 948 stations, only 53, each selling more than 60,000 gallons annually, show a profit while 895 stations, each selling less than 60,000 gallons per year, were operated at a loss. A similar table for 1931 showed total net earnings of $141,690, but if a store tax equal in amount to that imposed by the act of 1933 had been deducted, there would have been a net loss of $53,330. Stations selling less than 30,000 gallons per

year were operated at a loss. For the first six months of 1933 there was a net operating loss of $53,905 without including the store tax of $102,476. With the tax included, there was a loss in each of the classes of stations.

A consideration of the business of the other oil companies show- similar conditions. In fact, the figures show that the plaintiff's operations in West Virginia were the most successful operations in the industry. Figures have been submitted for the Gulf Refining Company, the Pure Oil Company, the Ashland Refining Company and the Sinclair Refining Company. The gross revenues per station of these four companies, excepting the Pure Oil Company, for which the figures are not available, are in each case substantially less per station than the Standard Oil Company, i. e., $2,512 for the Gulf Refining Company, $3,177 for the Ashland Refining Company and $3,909 for the Sinclair Refining Company. For the year 1932 (Gulf S. 33; Standard S. 101-2), a total operating loss of the Gulf Refining Company was $360,876. Apparently this applied only to service stations. With the Pure Oil Company (S. 104) there was a net loss per station in each year from 1931 to 1933; with the Ashland Refining Company there was a similar result in 1932 [fol. 538] and six months of 1933, for which years only the figures are given. For the Sinclair Refining Company (S. 112) there was a net loss in each of the years 1931 to 1933.

The net operating figures of the Standard Oil Company contained in the stipulation were obtained from the records of the company by competent accountants, who, if called to testify, would say that the figures and the computation based thereon had been properly determined in accordance with sound accounting principles. However, it was not agreed that the figures showed the true earnings from the sales at the stations of that company, and it was suggested that the figures, even if correctly taken from the books of the company, do not truly represent its earnings because it has many ramifications and affiliations through which it produces and refines oil, and hence it may be that larger profits are realized from the marketing of the company's products than are shown by the calculations referred to, and are credited to some other department of the business. Having this idea in mind, the Attorney General requested (S. 94) that he be furnished with the names of all the Standard Oil group of companies, including parent com-

panies, subsidiary companies and affiliates; the character of business engaged in by the various companies; the character of affiliation; and the separate profits and losses of all of said companies for the years 1930 to 1932 and the first eight months of 1933. In reply to this request, it was shown that the Standard Oil Company (incorporated in New Jersey), the parent corporation, is solely a holding company, and owns all of the stock or an interest in a number of producing, manufacturing, transporting and marketing companies engaged in the petroleum and natural gas business and collateral enterprises in the United States, Canada, England, France, Germany, Italy, Poland, Australia, Brazil, Argentina, Mexico, Norway, Sweden, Dutch East Indies and other countries; and it was stipulated that the accountants of the company, if asked to furnish the information contained in the request of the Attorney Gen- [fol. 539] eral, would decline to make further answer than that included in the calculations referred to, or to give any information concerning the profits and losses of the subsidiaries and affiliates for the reason that such information would be immaterial to the matters involved in the case, as it would concern matters outside of the marketing transactions of the plaintiff, the Standard Oil Company of New Jersey, a Delaware corporation. Certain figures, however, were furnished with relation to the profits or losses of the Carter Oil Company, from which the crude oil purchased by the plaintiff for refining in West Virginia at Parkersburg, and for ultimate sale in the gasoline stations in that state; also figures were given with reference to the profits or losses of the Oklahoma Pipe Line Company and the Ajax Pipe Line Company with reference to the transportation of oil to the Parkersburg Refinery.

The stipulated facts (S. 52 et seq.) with reference to the methods used by the plaintiff in the conduct of its business and the keeping of its accounts, make it possible to decide whether the figures taken from its books correctly show the net profits or losses of the business done at its stations in West Virginia. The plaintiff company does not produce oil; it owns no oil property but merely refines, transports and distributes petroleum products. It purchases the oil which it refines from the Carter Oil Company, an exclusively owned subsidiary which produces approximately one-third, and purchases two-thirds of the oil which it handles.

The price paid for this crude oil by the taxpayer to the Carter Oil Company is the posted price which the Carter Oil Company pays for the crude product, plus 5¢ per barrel to cover the cost of purchasing, handling and selling the oil. The cost price to the Parkersburg Refinery also covers the transportation charges by way of pipe line, which are fixed by tariffs filed with the Interstate Commerce Commission. The oil is transported to the refinery through certain pipe lines, in some of which the Standard Oil Company has an interest, and in others in which it has no interest. In addi- [fol. 540] tion to petroleum products, certain accessories, such as automobile tires, tubes, batteries, spark plugs and other accessories are purchased by the plaintiff from the Atlas Supply Company, 20% of whose stock is owned by an affiliated corporation. The figures thus obtained show that during the years 1930 to 1933, the business of the Parkersburg Refinery was run at substantial net loss.

These figures, however, do not determine the cost or billing price at which the petroleum products furnished by the refineries of the company to its marketing departments is accounted for. These billing prices are fixed from time to time by the New York office of the company at figures which approximate those currently reported as open market prices in the respective regional market areas. (S54) Prevailing market prices are compiled and published each week by trade journals. Recognized regional markets for petroleum products are found in certain oil producing sections, such as Oklahoma, Western Pennsylvania, which includes West Virginia, Ohio, Kansas, Texas, etc. According to the oil price handbook, issued annually by the National Petroleum News, a trade Journal, there are 42 companies operating 52 oil refineries in the Western Pennsylvania regional market area. In accordance with this practice, the refining billing price of the plaintiff company to its stations in West Virginia have not been based upon the cost of production in the company's refineries, but upon the prevailing market prices so compiled and published. During the years in question, the retail posted prices of gasoline promulgated by the principal distributors in the State of West Virginia as a general rule have been uniform at the same time and place in the several trade areas of the state. We conclude from these stipulations that the figures, relating to the profits and losses of the gasoline and oil stations of the company, may be relied on as truly representing the results

of the company's marketing transactions in the state. It may well be that the company in normal times derives a profit through its affiliation with other corporations en- [fol. 541] gaged in producing or transporting oil, or through its own activities in the refining of oil in the State of West Virginia, but it does not appear that these transactions affect the profit or loss of marketing the refined product at wholesale or retail in the state. Since the cost at which the goods are charged by the refinery to the filling stations is the prevailing wholesale market price, and the retail selling price is established, the difference represents the profit or loss at which the business of the stations is conducted; and it is upon the privilege of conducting this business that the store tax is imposed.

It may be added that the price at which the goods are billed by the refinery to the stations which it owns or controls is slightly less than its billing price to the independent stations.

Morris A. Soper, United States Circuit Judge. Geo. W. McClintic, United States District Judge. W. Calvin Chesnut, United States District Judge.

[fol. 542] In United States District Court

[Title omitted]

Stipulation as to Amendment of Findings of Fact—Filed April 2, 1934

It is hereby stipulated by and between counsel for the respective parties to this suit, that, with the approval of the Court, the findings of fact made by the Court be amended as follows:

On page sixty-six of the printed copy of the Opinion and Findings of Facts, that for the sentence beginning with the words, "The oil is transported" and concluding with the words "an affiliated corporation", on page sixty-seven, there be substituted:

"The oil is transported to the refinery through certain pipe lines, in some of which the plaintiff Standard Oil Company of New Jersey, a Delaware corporation, has an interest, and in others, it has not interest. In addition to pe-

troleum products, certain accessories, such as automobile tires, tubes, batteries, spark plugs, and other accessories, are purchased by the plaintiff from the Atlas Supply Company, twenty per cent of whose stock is owned by a corporation affiliated with the said plaintiff. The interests, if any, of the parent company, Standard Oil Company, a New Jersey Corporation, in said pipe lines and in said Atlas Supply Company, are not found."

Rummel, Blagg & Stone, Counsel for the Plaintiff, by H. D. Rummel. Fred L. Fox, In His Individual Right, etc., by Homer A. Holt, Counsel for the Defendant.

Stipulation approved.

Morris A. Soper, U. S. Circuit Judge. W. Calvin Chesnut, U. S. District Judge. Geo. W. McClintic, U. S. District Judge.

[fol. 543] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF DEFENDANT FOR THE FINDING OF SEPARATE CONCLUSIONS BY THE COURT—Filed April 2, 1934

The defendant moves that the Court state separately its conclusions of law in deciding the above-styled suit and that the conclusions be entered of record as provided by Equity Rule No. 70½.

Fred L. Fox, in His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia, by Counsel: Homer A. Holt, Attorney General.

Motion overruled because conclusions of law appear in the Court's opinion.

Geo. W. McClintic, U. S. District Judge. Morris A. Soper, U. S. Circuit Judge. W. Calvin Chesnut, U. S. District Judge.

[fol. 544] IN UNITED STATES DISTRICT COURT

In Equity. No. 3312

STANDARD OIL COMPANY OF NEW JERSEY, a Corporation Created under the Laws of the State of Delaware,

vs.

FRED L. FOX, in His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia

DECREE—April 2, 1934

The Court, having maturely considered the issues arising upon the pleadings, orders, stipulations, and all the proceedings heretofore had in the cause, as fully set out in the order of submission entered herein on December 20, 1933, and the arguments of counsel thereon, is of opinion, for reasons stated in its separate findings of fact and its written opinions containing its conclusions of law hereinafter referred to, that the plaintiff is entitled to the relief prayed for in its said bill of complaint.

It is therefore adjudged, ordered, and decreed that the motion of the defendant to dismiss the bill of complaint herein be and the same is hereby overruled, and that the defendant, Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, be and he is hereby perpetually enjoined, restrained, and inhibited from paying into the treasury of the State of West Virginia the sum of $240,173.50, heretofore paid to him by the plaintiff under protest, demanded under the color of the terms of House Bill No. 112, passed by the Legislature of the State of West Virginia on the 8th day of March, 1933, as set out in the bill and proceedings herein; and that said defendant be and he is hereby further required forthwith to account to the plaintiff for said sum and to repay the same to the plaintiff.

It is further adjudged, ordered, and decreed that said [fol. 545] defendant be and he is hereby further perpetually enjoined, restrained, and inhibited from requiring or attempting to require the plaintiff to procure any license or pay any tax under or by virture of the terms or provisions of said House Bill No. 112, and from enforcing or

attempting to enforce the provisions of said House Bill No. 112 against the plaintiff in any manner.

The opinion prepared in this cause by Judge Soper is concurred in by Judges Chesnut and McClintic; the separate opinion prepared by Judge Chesnut is concurred in by Judges Soper and McClintic; and both of said opinions, stating the conclusions of law by the Court, are ordered to be filed as parts of the record herein, together with a statement of the findings of fact made by the Court, which is concurred in by all of the Judges.

Geo. W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia. Morris A. Soper, United States Circuit Judge. W. Calvin Chesnut, U. S. District Judge.

[fol. 546] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed April 25, 1934

To Messrs. Rummell, Blagg & Stone, Attorneys for Plaintiff in above styled cause:

Please take notice that defendant in the above styled cause, feeling aggrieved by the decree entered therein on the 2nd day of April, 1934, will, on the 25th day of April, 1934, or as soon thereafter as counsel may be heard, present to the Court his petition praying for allowance of an appeal to the Supreme Court of the United States, and for the entry of an order of supersedeas staying the execution of said decree pending the final disposition of this cause [fol. 547] and fixing the amount of security to be given, accompanied with his "Assignment of Errors" and his "Statement on Behalf of Defendant as to Jurisdiction of the Supreme Court of the United States to Review Decree upon Appeal," a copy of each of which said papers is attached hereto.

Homer A. Holt, Attorney General of West Virginia, Counsel for Defendant.

Service of a copy of the above and foregoing notice acknowledged this 19th day of April, 1934.

H. D. Rummel, D. O. Blagg, A. G. Stone, Solicitors for Plaintiff.

[fol. 548] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed April 25, 1934

To the Honorable Morris A. Soper, Judge of the United States Circuit Court of Appeals for the Fourth Circuit; the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia, and the Honorable W. Calvin Chesnut, Judge of the District Court of the United States for the District of Maryland, composing a statutory court under the provisions of Section 266, amended, of the Judicial Code:

Now comes the defendant, Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, and considering himself ag- [fol. 549] grieved by the decree entered on the 2nd day of April, 1934, in the above entitled cause, awarding a permanent injunction as prayed for in plaintiff's bill of complaint, does hereby appeal therefrom to the Supreme Court of the United States for reasons specified in the assignment of errors, which is filed herewith, and prays:

1. That this appeal be allowed;

2. That a citation be issued to the above named plaintiff, Standard Oil Company of New Jersey, a corporation created under the Laws of the State of Delaware, as provided by law;

3. That an order of supersedeas be entered herein pending the final disposition of the cause, and that the amount of surety for a supersedeas and cost bond be fixed by the order allowing the appeal;

4. That a transcript of the record, proceedings and papers upon which said decree was predicated, duly authenticated, be sent to the Supreme Court of the United States, together with the typewritten statement of defendant disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the decree and his præcipe indicating the portions

of the record to be incorporated in the transcript, which statement and præcipe are filed herewith.

Fred L. Fox, in His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia, by Homer A. Holt, Attorney General of West Virginia, His Counsel.

The undersigned counsel of record for the plaintiff hereby acknowledge service of a copy of the foregoing petition for appeal.

Dated at Charleston, West Virginia, this 25th day of April, 1934.

H. D. Rummel, D. O. Blagg, A. G. Stone, Counsel for Plaintiff.

[fol. 550] Appeal allowed upon defendant giving bond conditioned as required by law, in the sum of Eleven Thousand Dollars ($11,000.00), the same to act as a Supersedeas Bond and also a bond for costs.

Geo. W. McClintic, Judge. Morris A. Soper, United States Circuit Judge. W. Calvin Chesnut, United States District Judge.

[fol. 551] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 25, 1934

Comes now Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, the defendant in the above styled cause, by his counsel, and says that there are manifest errors in the record, proceedings and final decree in said cause, upon which he will rely upon his appeal from the decree entered on the 2nd day of April, 1934, and for the purpose of having the cause reviewed in the Supreme Court of the United States makes the following assignment of errors, to-wit:

1. The court erred in overruling defendant's motion to dismiss plaintiff's bill of complaint for want of jurisdiction. [fols. 552-563] 2. The court erred in holding, as a conclusion of law, that the several filling or service stations owned and/or operated by plaintiff, are not stores, within the meaning of the term "store" as defined in the "Chain

Store Act'' House Bill No. 112 (Chapter 36, Acts of the West Virginia Legislature, 1933, Regular Session).

3. The court erred in holding as a conclusion of law that the enforcement of said House Bill No. 112 (Chapter 36 Acts of the Legislature of West Virginia, 1933 Regular Session), against the plaintiff denies the plaintiff the equal protection of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

4. The court erred in awarding the permanent injunction prayed for in said bill of complaint.

Wherefore, the Defendant, Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, prays that the decree of the District Court of the United States for the Southern District of West Virginia, be reversed, and that the injunction granted by said court be dissolved, and a judgment entered in accordance with the rights of defendant.

Homer A. Holt, Attorney General of West Virginia,
Counsel for Defendant.

The undersigned, counsel of record for the plaintiff, hereby acknowledge service of a copy of the foregoing assignment of errors.

Dated at Charleston, West Virginia, this 25th day of April, 1934.

H. D. Rummel, D. O. Blagg, A. G. Stone, Counsel for Plaintiff.

[fol. 564] In United States District Court

In Equity. No. 3312

Standard Oil Comany of New Jersey, a Corporation Created under the Laws of the State of Delaware, Plaintiff,

versus

Fred L. Fox, in His Individual Right and in His Official Capacity as Tax Commissioner of the State of West Virginia, Defendant

Before Soper, Circuit Judge, and McClintic and Chesnut, District Judges

Order Allowing Appeal—April 25, 1934

This cause coming on further to be heard upon the petition of Fred L. Fox, in his individual right and in his official

capacity as Tax Commissioner of the State of West Virginia, the defendant, for the allowance of an appeal to the Supreme Court of the United States, in which petition said defendant prays that the permanent injunction granted by the final decree be suspended during the pendency of the appeal, and that the amount of security for a supersedeas and cost bond to be executed by him be fixed.

And it appearing to the court that such suspension should be granted only upon the giving of an adequate bond which will fully protect the plaintiff in the event that the final decree of this court is affirmed.

It is ordered: That the appeal prayed for is granted;

That the permanent injunction is suspended during the pendency of this appeal, upon the condition that the said defendant, Fred L. Fox, make and file a supersedeas and cost bond, with good and sufficient surety, in the sum of [fol. 565] Eleven Thousand Dollars ($11,000.00), which bond, in addition to the usual conditions required by law, shall provide that in the event the defendant shall not make his plea good, he shall promptly pay to plaintiff all moneys collected (under Chapter 36, Acts of the Legislature of West Virginia, 1933, Regular Session), from the plaintiff on account of stores operated and maintained by it, together with proper interest thereon.

That the Clerk of this Court transmit to the Supreme Court of the United States in the manner provided by law, a transcript of such parts of the record and proceedings herein, duly authenticated, as the parties, defendant and plaintiff, may by præcipe duly designate.

That a citation be issued admonishing the plaintiff to be and appear in the Supreme Court of the United States on or before the 4th day of June, 1934.

Whereupon came the said Fred L. Fox, defendant as aforesaid, and tendered a cost and supersedeas bond, executed by him as principal, and by Fidelity and Casualty Company of New York, a Corporation, as surety, in the amount of Eleven Thousand Dollars, ($11,000.00) and conditioned in accordance with the provision of this order, which bond, having been inspected by the Court, is approved and ordered filed.

Geo. W. McClintic, Judge. Morris A. Soper, United States Circuit Judge. W. Calvin Chesnut, U. S. District Judge.

The undersigned counsel of record for the Appellee hereby acknowledge service of a copy of the above order allowing appeal, this 25th day of April, 1934.

H. D. Rummel, D. O. Blagg, A. G. Stone, Counsel for Appellee.

[fols. 566-568] Supersedeas bond on appeal for $11,000, approved and filed April 25, 1934, omitted in printing.

[fols. 569 & 570] Citation in usual form, showing service on H. D. Rummel et al., omitted in printing.

[fol. 571] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed April 25, 1934

To the Clerk of the District Court of the United States for the Southern District of West Virginia:

You will please prepare a transcript of the record to be transmitted to the Supreme Court of the United States, in pursuance of the appeal heretofore allowed in this cause, and include therein the following:

The bill of complaint of the plaintiff, with Exhibits A to J, both inclusive, filed therewith;

Notice of motion for temporary restraining order;

Motion for temporary restraining order;

Order granting temporary restraining order;

Application for interlocutory injunction;

[fol. 572] Stipulation of plaintiff that time for filing defendant's answer be enlarged;

Order enlarging time for filing of defendant's answer.

Notice to H. G. Kump, Governor, H. A. Holt, Attorney General, and Fred L. Fox, Tax Commissioner, of hearing on application for interlocutory injunction;

Motion to dismiss plaintiff's bill, and answer of defendant with Exhibits A and B filed therewith;

First Amended Bill of Complaint of Plaintiff;

First Amended Answer of Defendant;

Order filing amended Bill of Complaint and Amended and Supplemental Answer;

Statement of Facts entered into between the plaintiff and the defendant in lieu of the formal taking of evidence, together with Exhibits Nos. 1 to 6, both inclusive, and sub-numbers thereof;

And pursuant to the following stipulation in the above styled cause, page 131, printed stipulation of facts:

"It is stipulated that counsel on either side herein may use, and the Court may consider herein, any facts contained in any stipulation made by the parties and filed in any of the following styled causes now pending in this Court, to-wit: Gulf Refining Company v. Fred L. Fox, Sinclair Refining Company v. Fred L. Fox, and Ashland Refining Company v. Fred L. Fox, as well as any allegations of the respective bills of complaint in said causes which are not denied by the answers thereto; subject to the right of either party to object to the competency or materiality of any such matter. And it is further stipulated that upon any appeal or appellate proceeding which may be taken in this cause, any of such portions of said three records as may be designated by either party shall be copied into the appellate record for consideration, subject to the same right of objection;"

[fol. 573] portions of said three records as follows:

In the case of Gulf Refining Company, Etc., v. Fred L. Fox, Etc., No. 3315, page 24, paragraph 18, printed stipulation:

"It is stipulated and agreed, for the purposes of this suit and as pertinent to the times mentioned in the pleadings and to the issues raised by the pleadings, that the plaintiff singly, or with other distributors of gasoline, posts, from time to time, the retail sales price of gasoline, including the gasoline products of the plaintiff; * * *"

In the case of Ashland Refining Company, Etc., v. Fred L. Fox, Etc., No. 3326, printed stipulation, page 7:

"In order to hold its customers and to meet the competition of the larger refiners and marketers already engaged in business in West Virginia when it entered that field, and

who inaugurated the lease and agency system, and in order also to conform to the price structures and trade practices established by such competitors, the Company found it necessary to resort to lease and agency agreements of its own so that it might allow dealers operating under such agreements the same margin of profit as dealers under similar agreements with other oil companies, and also install its own equipment for use by the dealers, because if such margin of profit had been allowed by the Company to dealers who were not under such agreements with the Company, then the Company would have invited retaliation by, and hostility from, its larger competitors, and further, because installation of equipment in non lease and agency stations was forbidden by the 1929 Code. Another reason for the use of the lease and agency agreements was the avoidance of the possibility of price wars which often occur in the gasoline distributing business when a smaller wholesaler gives a larger margin of profit to its dealers than its larger competitors under similar conditions. * * *"

And Page 12:

"The larger companies from time to time designate what are known as the posted retail prices of gasoline. Among the larger companies this price is substantially uniform and plaintiff endeavors to conform thereto and adopt such posted price as its price. * * *"

In the case of Sinclair Refining Company, Etc., v. Fred L. Fox, Etc., No. 3325, typewritten stipulation, paragraph C, page 5:

"The operator sells the petroleum products delivered to him by the plaintiff at the retail prices posted by the plaintiff singly or with other distributors. Such posted retail prices of the major distributing companies have been ordinarily uniform during the past three years. * * *"

[fol. 574] Order submitting the cause for decision;

Opinions and Findings of Fact by the Court;

Stipulation between counsel for plaintiff and counsel for defendant as to amendment to Findings of Fact made by the Court, with approval of court endorsed thereon;

Motion of defendant that Court state separately and enter of record its conclusions of law, with notation of court overruling same endorsed thereon;

Final decree awarding a permanent injunction;

Notice of Application for Appeal;

The petition for appeal to the Supreme Court of the United States, and acknowledgment of service thereon;

Assignment of Errors accompanying petition for appeal and prayer for reversal contained therein; and acknowledgment of service thereon;

Statement of defendant disclosing basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question;

Notice to appellee required by U. S. Supreme Court Rule 12 (2);

Order allowing the appeal, granting a supersedeas and approving the cost and supersedeas bond, with acknowledgment of service thereon;

Cost and supersedeas bond with approval of the Court endorsed thereon;

Citation with acknowledgment of service thereon;

All orders of the Court filing pleadings or otherwise made with reference to the cause, not specifically mentioned herein.

This Præcipe, with acknowledgment of service upon, and approval of by counsel of record for Appellee endorsed thereon.

Please certify the same to the Supreme Court of the United States under your seal and in accordance with the rules of said Court and with the laws of the United States relating to such appeals.

(Signed) Homer A. Holt, Attorney General of West Virginia, Counsel for Appellant.

Dated this 25th day of April, 1934.

[fol. 575] The undersigned attorneys of record for the Appellee in the above entitled cause, hereby acknowledge service of the above Præcipe, and approve the same, this 25th day of April, 1934.

(Signed) H. D. Rummel, (Signed) D. O. Blagg, (Signed) A. G. Stone.

[fols. 576 & 577] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 578] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON—Filed May 28, 1934

Comes now the appellant in the above-entitled cause and states that the points upon which he intends to rely in this Honorable Court in this case are as follows:

Point I

The alleged questions of constitutionality under the Constitution of the United States have been decided adversely to the contentions of the appellee so consistently that such [fol. 579] questions are now insubstantial and frivolous, and the suit is one against the State of West Virginia for the maintenance of which, by reason of the Eleventh Amendment to the Constitution of the United States, there is no Federal jurisdiction.

Point II

The classification of the subject matters of taxation of House Bill No. 112 (Chapter 36) Acts of the Legislature of West Virginia, Regular Session, 1933, is reasonable and well founded in fact and law, and the imposition of the taxes thereof upon the appellee does not deprive the appellee of property without due process of law or deny the appellee the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Point III

The title of said House Bill No. 112 (Chapter 36) Acts of the Legislature of West Virginia, Regular Session, 1933, gives a fair and reasonable index to all of the purposes of the act and complies with the requirements of Section 30, Article VI of the Constitution of West Virginia.

Point IV

The filling stations and bulk plants for the operation of which the appellee was required to pay the taxes provided by said House Bill No. 112 (Chapter 36) Acts of the Legislature of West Virginia, Regular Session, 1933, are stores

or mercantile establishments owned, operated, maintained and/or controlled by the appellee within the meaning of said act.

[fol. 580] Point V

The Constitution of West Virginia does not prevent the reasonable classification of the subject matters of taxation and the imposition of the taxes provided by House Bill No. 112 (Chapter 36) Acts of the Legislature of West Virginia, Regular Session, 1933, does not deprive the appellee of property without due process of law in violation of the provisions of Section 10 of Article III of the Constitution of West Virginia.

Point VI

The imposition of the taxes provided by House Bill No. 112 (Chapter 36) Acts of the Legislature of West Virginia, Regular Session, 1933, upon the appellee is not violative of the "equal and uniform" provision of the Constitution of West Virginia, Section 1, Article X as amended in 1932, and no part of said section of the Constitution of West Virginia inhibits the imposition of graduated taxes upon classified subject matters of taxation.

And the appellant further adopts and will rely upon the assignments of error filed with his petition for appeal on April 25, 1934.

Dated this 28th day of May, 1934.

Homer A. Holt, Attorney General of West Virginia; R. Dennis Steed, Acting Assistant Attorney General of West Virginia, Counsel for Appellant.

[fols. 581-583] Service of a copy of the foregoing Statement of Points is hereby acknowledged on behalf of the appellee, this the 28th day of May, 1934.

H. D. Rummel, D. O. Blagg, A. G. Stone, Counsel for Appellee.

[fol. 584] In Supreme Court of the United States

Stipulation of Parts of Record Necessary for Consideration of Case—Filed May 28, 1934

Appellant and appellee agree that in their opinion the entire record as filed is necessary for the consideration of

the case and needs to be printed by the clerk for the hearing thereof, except:

I

Of Exhibit "D" filed with bill of designation of stations, pages 67 to 96, inclusive, tr., may be omitted.

[fol. 585] II

Exhibit "I" with bill (pp. 113-115, inc., tr.) may be omitted, the same appearing as Sections 2 and 3 of Exhibit "A" with answer (pp. 171-172, tr.).

III

None of the exhibits Nos. 1 to 5, inclusive, and sub-numbers thereof, filed with stipulation of facts, pages 355 to 485, incl., transcript, need be printed.

In lieu thereof it is agreed that the summarization of such exhibits as there reflected correctly appears elsewhere in the stipulation and in the tables set forth in the findings of fact by the Court; and it is agreed that the following tables hereto attached and numbered "Table No. 4", "Table No. 5", "Table No. 6", and "Table No. 7", may be printed as a summarization of a part of said exhibits; and it is further agreed that the newspaper advertisements referred to (being pages 445 to 451, incl., tr.,) contain either or both of the following statements: "Essolene is sold at all Esso stations and Dealers from Maine to Louisiana." "Essolene, Esso and Essolube—the 5-Star Motor Oil, are sold at Esso Stations and Dealers owned, operated, or supplied by the following companies: the Standard Oil Company of New Jersey, the Standard Oil Company of Pennsylvania, the Standard Oil Company of Louisiana, and the Colonial Beacon Oil Company, Inc."

Said exhibits with the transcript shall be preserved for use of Court or counsel as desired, and counsel may supply such photostatic or other reproduced copies of exhibits as counsel may desire or as may be required by the Court.

Formal matters and duplications may be omitted with due notation as provided by Paragraph 9, Rule 13; and for the convenience of the clerk in noting duplications it is sug-
[fol. 586] gested that the Chain Store Act is set forth in full as Exhibit "A" with the bill (p. 52-56, inc., tr.) and is further set forth with the opinions (p. 527-529, inc., tr.).

Table No. 6 hereto attached appears with findings of fact, (p. 534 tr.).

Dated this 28th day of May, 1934.

Homer A. Holt, R. Dennis Steed, Counsel for Appellant, Fred L. Fox, etc. H. D. Rummel, Donald O. Blagg, A. G. Stone, Counsel for Appellee, Standard Oil Company, etc.

[fol. 587]

Table No. 4

Standard Oil Company of New Jersey

Summary of Sales and Net Earnings at all Stations in West Virginia for Calendar Years 1931, 1932, and First Six Months, 1933

	1931	1932	6 mos. 1933
Number bulk plants...	78	63	54
Number company and agency stations.....	911	1,046	949
Gallonage petroleum products.....	35,052,489.7	32,643,586.8	12,848,427.4
Revenue from petroleum products.....	$6,380,780.42	$6,093,701.68	$2,035,414.83
Revenue from other products.....	243,060.34*	166,495.16*	65,246.99*
Revenue from services.	81,502.82	58,816.12	23,920.60
Total gross revenue.	$6,705,343.58	$6,319,012.96	$2,124,582.42
Average gross revenue per station.....	7,360.42	6,041.12	2,238.76
Total net earnings...	491,250.88	259,797.60	89,581.45**
Average net earnings per station.....	539.24	248.37	94.31**
Chain store tax computed on number of stations and bulk plants.....	236,666.50	266,726.50	240,173.50
Average chain store tax (computed).....	239.29	240.51	119.71***

* Does not include sales of tires and other products to leased and vending privilege outlets.

** Loss. Store tax not taken into account.

*** Six months only.

[fol. 588]

Table No. 5

Gross Revenue and Net Earnings to Plaintiff from Sale of Petroleum Products at Leased Outlets and Vending Privilege Outlets (Agency Stations) Grouped and Ranked According to Gallons of Motor Fuel Sold Calendar Year 1931

Group No.	Annual gallonage classification	No. outlets in group	Total gross revenue	Total store tax for group	Total net earnings	Profit or loss after payment store tax: Profit	Profit or loss after payment store tax: Loss	Gross average revenue per outlet by groups	Average store tax per outlet	Average net earnings per outlet by groups	Profit or loss per outlet after deducting store tax: Profit	Profit or loss per outlet after deducting store tax: Loss
1	0— 10,000	257	$239,429.43	$61,497.53	$9,237.96	$.....	$52,259.57	$931.63	$239.29	$35.95	$.....	$203.34
2	10— 20,000	201	502,230.07	48,097.29	21,354.81	.....	26,742.48	2,498.65	239.29	106.24	.....	133.05
3	20— 30,000	121	494,398.41	28,954.09	20,394.83	.....	8,559.26	4,085.94	239.29	168.55	.....	70.74
4	30— 40,000	79	455,126.74	18,903.91	18,991.80	87.89	.....	5,761.09	239.29	240.40	1.11	.....
5	40— 50,000	55	404,427.76	13,160.95	16,319.84	3,158.89	.....	7,353.23	239.29	296.72	57.43	.....
6	50— 60,000	33	298,911.60	7,896.57	12,391.86	4,495.29	.....	9,057.92	239.29	375.51	136.22	.....
7	60— 75,000	27	301,721.00	6,460.83	12,781.46	6,320.63	.....	11,174.85	239.29	473.38	234.09	.....
8	75—100,000	24	342,941.31	5,742.96	13,584.96	7,842.00	.....	14,289.22	239.29	566.04	326.75	.....
9	over 100,000	18	401,402.96	4,307.22	16,633.36	12,326.14	.....	22,300.16	239.29	924.07	684.78	.....
Totals		815	$3,440,589.28	$195,021.35	141,690.88	$34,230.84	87,561.31					
						Net loss...	$53,330.47					

			For 815 outlets	Per outlet
Average gross revenue per outlet, 815 outlets combined, 1931....	$4,221.58	Chain store tax based on computed average for 989 units in 1931...	$195,021.35	$239.29
Average net earnings per outlet, 815 outlets combined 1931.....	$173.85	Net earnings.....	$141,690.88	173.85
		Payment of chain store tax out of capital.....	$53,330.47	$65.44

[fol. 592] [File endorsement omitted.]

Endorsed on cover: File No. 38,695. D. C. U. S., S. West Virginia. Term No. 69. Fred L. Fox, in his Individual Right and in his official capacity as Tax Commissioner of the State of West Virginia, Appellant, vs. Standard Oil Company of New Jersey. Filed May 28, 1934. File No. 38,695. 69, O. T., 1934.

(5119-C)

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Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416, 49 L. Ed. 1108	10
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Statutes Cited.

Act of the Legislature of West Virginia of March 8, 1933, House Bill No. 112 (published in Chapter 36 of the Official "Acts of the West Virginia Legislature, Regular Session, 1933," pages 103-107), Section 1	3
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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

In Equity.

No. 3312.

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

Plaintiff,

versus

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Defendant.

BEFORE SOPER, CIRCUIT JUDGE, AND MCCLINTIC AND CHESNUT, DISTRICT JUDGES.

STATEMENT ON BEHALF OF DEFENDANT AS TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES TO REVIEW DECREE UPON APPEAL.

(Filed April 25, 1934.)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, the defendant, Fred L. Fox, in his individual right and in his official capacity as tax

commissioner of the State of West Virginia, submits his statement disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decree in the above-entitled cause:

A.

Statutory Provision Conferring Jurisdiction.

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment and decree here complained of is conferred by Judicial Code, Section 238, amended (Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; 28 U. S. C. A., Sec. 345) which provides:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:"
>
> • • • • • • •
>
> "(3) Section 380 of this title."
>
> • • • • • • •

Section 380 of the Title (Judicial Code, Section 266, amended) referred to in the foregoing statute, reads (in part) as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court or by any District Court of the United States, or by any judge thereof, or by any circuit

judge, acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

State Statute the Validity of Which Is Involved.

The Statute of the State of West Virginia, the validity of which is involved, is House Bill No. 112, passed at a regular session of the Legislature on March 8, 1933, in effect from passage, and published in Chapter 36 of the official "Acts of the West Virginia Legislature, Regular Session, 1933," pages 103-107, which reads as follows:

An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state tax commissioner in connection therewith, and prescribing penalties for the violation thereof.

Be it enacted by the Legislature of West Virginia:

SECTION 1. It shall be unlawful for any person, firm, corporation, association or copartnership, either foreign or domestic, to operate, maintain, open or establish any store in this state without first having obtained

a license so to do from the state tax commissioner, as hereinafter provided.

SEC. 2. Any person, firm, corporation, association or copartnership desiring to operate, maintain, open or establish a store in this state, shall apply to the state tax commissioner for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the state tax commissioner, and shall set forth the name of the owner, manager, trustee, lessee, receiver or other person desiring such license, the name of such store, and such other facts as the state tax commissioner may require. If the applicant desires to operate, maintain, open or establish more than one such store, he shall make a separate application for a license to operate, maintain, open or establish each such store, but the respective stores for which the applicant desires to secure licenses may all be listed on one application blank. Each such application shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section five of this act.

SEC. 3. As soon as practicable after the receipt of any such application, the state tax commissioner shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If, upon examination the state tax commissioner shall find that any such application is not in proper form and does not contain the necessary and requisite information, he shall return such application for correction. If an application is found to be satisfactory, and if the filing and license fees, as herein prescribed, shall have been paid, the state tax commissioner shall issue to the applicant a license for each store for which an application for license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store for which such license is issued.

SEC. 4. All licenses shall be so issued as to expire on the thirty-first day of December of each calendar

year. On or before the first day of January of each year, every person, firm, corporation, association or copartnership having a license shall apply to the state tax commissioner for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the state tax commissioner. No license shall lapse prior to the thirty-first day of January of the year next following the year for which such license was issued; if a renewal license has not been made, the state tax commissioner shall notify such delinquent license holder thereof, by registered mail, and if application is not made for and a renewal license issued on or before the last day of February, next ensuing the former license shall lapse and become null and void. Each such application for a renewal license shall be accompanied by a filing fee of fifty cents, and by the license fee as prescribed in section five of this act.

SEC. 5. Every person, firm, corporation, association or copartnership opening, establishing, operating, maintaining one or more stores or mercantile establishments, within this state under the same general management, supervision or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The annual license fee prescribed herein shall be as follows: (1) Upon one store, the annual license fee shall be two dollars for each such store; (2) upon two stores, or more, but not to exceed five stores, the annual license fee shall be five dollars for each such additional store; (3) upon six stores or more, but not to exceed ten stores, the annual license fee shall be ten dollars for each such additional store; (4) upon each store in excess of ten, but not to exceed fifteen, the annual license fee shall be twenty dollars for each such additional store; (5) upon each store in excess of fifteen and not to exceed twenty stores, the annual license fee shall be thirty dollars for each such additional store; (6) upon each

store in excess of twenty, but not to exceed thirty stores, the annual license fee shall be thirty-five dollars for each such additional store; (7) upon each store in excess of thirty, but not to exceed fifty stores, the annual license fee shall be one hundred dollars; (8) upon each store in excess of fifty, but not to exceed seventy-five stores, the annual license fee shall be two hundred dollars; (9) upon each store in excess of seventy-five the annual license fee shall be two hundred fifty dollars for each additional store.

SEC. 6. Each and every license issued prior to the first day of July of any year shall be charged for at the full rate, and each and every license issued on or after the first day of July of any year shall be charged for at one-half of the full rate, as prescribed in section five of this act.

SEC. 7. The provisions of this act shall be construed to apply to every person, firm, corporation, copartnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

SEC. 8. The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale.

SEC. 9. Any person, firm, corporation, copartnership, or association who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each and every day that such violation shall continue shall constitute a separate and distinct offense.

SEC. 10. Any and all expenses incurred by the state tax commissioner in the administration of this act shall be paid out of the funds accruing from the fees imposed by and collected under the provisions of this act. All money collected under the provisions of this act shall be paid into the state treasury, monthly, by the state tax commissioner, and shall be added to and shall constitute a part of the general fund for the elementary schools.

SEC. 11. No injunction shall issue from any court in this state enjoining the collection of any license tax provided herein, but the party claiming that any license is not due, for any reason, shall pay the same under protest with right to collect the same from the state tax commissioner by an appropriate remedy as provided by law.

SEC. 12. The provisions of this act are several, and if any section, provision, word or clause of this act be declared invalid, the decision of the court shall not affect or impair any of the remaining provisions of this act. It is hereby declared as a legislative intent that this act would have been adopted had such invalid portion not been included herein.

C.

Date of Decree and Application for Appeal.

The decree sought to be reviewed was entered on the 2nd day of April, 1934.

The application for appeal is presented on this the 25th day of April, 1934.

D.

Nature of Case and Rulings of the Court.

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by Standard Oil Company of New Jersey, a corporation

created under the laws of the State of Delaware, against defendant, Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, to secure an injunction to restrain the defendant from paying into the treasury of the State, tax money in the sum of $240,173.50, paid to him under protest by the plaintiff, by reason of the provisions of an Act of the Legislature of West Virginia known as the "Chain Store Tax Act" (House Bill No. 112, Chapter 36, Acts 1933 Regular Session) on account of license taxes for the operation and maintenance of certain stores owned by plaintiff, and to restrain defendant from in any manner enforcing against the plaintiff the provisions of said House Bill No. 112.

The Act requires a license for the operation of each store graduated in amount according to the number of stores operated by the same person, firm or corporation, and vests the administration thereof in the State Tax Commissioner.

The bill alleged that the State Tax Commissioner had required plaintiff to pay the license for 1,003 stores totaling $240,173.50.

The plaintiff gave notice of application for and sought an interlocutory injunction, and insisted thereon and sought the relief upon the alleged unconstitutionality of the Act under the Constitution of the United States, because:

1. The Act deprived the plaintiff of property without due process of law and denied the plaintiff the equal protection of law, contrary to the provisions of the Fourteenth Amendment.

2. The plaintiff sought relief on grounds involving other than Federal questions, because:

(1) The gasoline filling or service stations and bulk distributing plants operated by plaintiff and for the operation of which the tax was imposed, are not stores within the meaning of the term "stores" as defined in the Act.

(2) If construed to be applicable to plaintiff, it violates the provision contained in Section Ten of Article Three of the Constitution of West Virginia, that no person shall be deprived of property without due process of law.

(3) If applied to plaintiff, it violates the provision of Section One of Article Ten of the Constitution of West Virginia, ratified and adopted by the voters of the State at a General Election held on November 8, 1932, that taxation shall be equal and uniform throughout the State.

The defendant moved to dismiss the bill on the ground that the Federal questions raised were frivolous and unsubstantial, because the right to impose a graduated license tax on chain stores had been so firmly established by the decisions of the Supreme Court of the United States that the contention that said House Bill No. 112 violated the Fourteenth Amendment to the Federal Constitution no longer constituted a substantial Federal question; and further that there was no equitable jurisdiction because plaintiff had an adequate remedy at law.

Defendant resisted the granting of injunctive relief on the grounds that plaintiff's filling or service stations were "stores" within the meaning of that term as defined and used in the Act; and that the Act did not violate any provision of the Federal or State Constitutions.

The judge of the District Court convened a court of three judges under Section 266, amended, of the Judicial Code (28 U. S. C. A., Sec. 380). The court, upon hearing the cause, held: That no adequate legal remedy had been afforded the plaintiff, and that, therefore the court was empowered to entertain the application for injunction and decide all questions involved, both State and Federal; that the equal protection of the law guaranteed by the Fourteenth Amendment was denied the plaintiff by the Act; that the filling or service stations of plaintiff were not

stores as the term was defined in the "Chain Store Act," and that the tax of $240,173.54, imposed upon the plaintiff corporation and paid by it under protest, was improperly collected, and that it is entitled to a decree whereby the defendant will be perpetually enjoined and restrained from paying said money into the State Treasury of West Virginia, and will be ordered and directed to account for and pay over said sum to the plaintiff.

Cases Believed to Sustain Jurisdiction.

1. *Direct Appeal from Statutory District Court.*

Cases sustaining direct appeal to the Supreme Court of the United States from special statutory court under Section 266, amended, Judicial Code:

Board of Tax Commissioners v. *Jackson,* 283 U. S. 527, 75 L. Ed. 1248;

Great A. & P. Tea Co. v. *Maxwell,* 284 U. S. 575, 76 L. Ed. 500;

Great A. & P. Tea Co. v. *Morrissett,* 284 U. S. 584, 76 L. Ed. 506;

A. Magnano Co. v. *G. W. Hamilton, Attorney General* (Wash.), *et al.,* Supreme Court of the United States, October Term, 1933, No. 589, decided April 2, 1934. Not yet reported.

2. *Existence of Federal Questions.*

In addition to the cases cited under (1), among others, the defendant will rely upon the following cases:

Ex Parte Joseph Poresky, 290 U. S. 30;

McGilvra v. *Ross,* 215 U. S. 70, 54 L. Ed. 95;

Leonard v. *Vicksburg, S. & P. R. Co.,* 198 U. S. 416, 49 L. Ed. 1108;

Liggett v. *Lee,* 283 U. S. 517, 77 L. Ed. 929.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal petitioned for in this cause.

HOMER A. HOLT,
Attorney General of West Virginia,
Counsel for Defendant.

The undersigned counsel of record for the plaintiff hereby acknowledge service of a copy of the above statement as to jurisdiction on appeal.

Dated at Charleston, West Virginia, this 25th day of April, 1934.

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

v.

STANDARD OIL COMPANY OF NEW JERSEY, *Appellee.*

BRIEF OF APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

v.

STANDARD OIL COMPANY OF NEW JERSEY, *Appellee*.

BRIEF OF APPELLANT

OPINIONS BELOW

The opinions of the court below are reported in 6 Fed. Supp. (Adv.), page 494.

JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1 of this Court. It is not controverted that Section 238,

as amended, of the Judicial Code confers jurisdiction upon this Court. Probable jurisdiction was noted on June 4, 1934.

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia rendered by a three-judge court convened under the provisions of Section 266, amended, of the Judicial Code (R. 73). The suit involves the constitutionality of the West Virginia chain store tax act as applied to so-called "gasoline filling stations" and bulk plants. The act is referred to as H. B. 112, or Chapter 36, Acts of the Legislature of West Virginia, Regular Session, 1933 (R. 38). The term "store" is defined by Section 8 of said act:

> "The term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale." (R. 40).

The act imposes a license fee for the operation of each store, graduated according to the number of stores operated within the state under the same management, supervision or ownership (R. 39), resulting in the following rates:

First store	$ 2.00
Second to fifth, inclusive	5.00 each
Sixth to tenth, inclusive	10.00 each

Eleventh to fifteenth, inclusive	20.00 each
Sixteenth to twentieth, inclusive	30.00 each
Twenty-first to thirtieth, inclusive	35.00 each
Thirty-first to fiftieth, inclusive	100.00 each
Fifty-first to seventy-fifth, inclusive	200.00 each
Seventy-sixth and all additional	250.00 each

(R. 39-40).

For each store a filing fee of fifty cents, in addition to the graduated license fee, is required (R. 38).

The appellee, Standard Oil Company of New Jersey, a Delaware corporation, is engaged in the refining and distribution of petroleum products as distinguished from the production and transportation of crude petroleum (R. 175), and operates principally in seven states, including West Virginia, and in the District of Columbia (R. 6). Appellee is a subsidiary of Standard Oil Company, a New Jersey corporation, which owns all of the capital stock of appellee Delaware corporation. The New Jersey corporation is a holding corporation, owning all of the stock or an interest in a large number of producing, manufacturing, transporting and marketing companies practically throughout the world (R. 146, 212).

On the effective date of the act appellee operated in West Virginia 101 filling stations (R. 49, 150) and 54 bulk plants (R. 49) owned by it, and 848 exclusive contract outlets (R. 49) on which appellee had leases and vending privilege leases [Exhibit "E" (R. 49) and Exhibit "G" (R. 58)], the rental of which was measured by the quantities of petroleum products sold, and operated by agents of appellee paid by commission [Exhibit "F" (R. 53) and Exhibit "H" (R. 62)], with respect to which it is stipulated that for the sale of petroleum products, which remained the property of appellee (R.

168), the operators were agents of appellee (R. 148, 164); in all 1003 stores upon which, under protest (R. 47), appellee paid $240,173.50 taxes and filing fees (R. 49).

Before the time appellant was required to pay said money into the state treasury (R. 36-72) appellee brought this suit in equity to enjoin the payment of the money into the state treasury (R. 37) claiming federal jurisdiction because the act was violative of the Fourteenth Amendment to the Constitution of the United States in denying the appellee the equal protection of the laws and depriving it of property without due process of law (R. 27), claiming jurisdiction in equity because of absence of adequate remedy at law (R. 35-36), and further presenting non-federal questions that filling stations were not stores within the meaning of the act (R. 20), and that, if construed to be applicable to appellee, the act violated the provisions of Section 10, Article III and Section 1, Article X of the Constitution of West Virginia (R. 32). The appellee applied for and insisted upon an interlocutory injunction (R. 71).

Appellant moved to dismiss the bill on the ground that the alleged federal questions were frivolous and insubstantial for the reason that the bill presented only alleged federal questions which had previously been decided by the Supreme Court of the United States contrary to the contentions of appellee (R. 75, 93) and because of the existence of an adequate remedy at law (R. 75). Appellant filed answer denying all allegations of unconstitutionality, state or federal, asserting that appellee's bulk plants and filling stations were stores within the meaning of the act (R. 89, 97, 102) and denying that appellee's business did not enjoy the so-called benefits of chain store operations considered in previous decisions (R. 94-97). An extended stipulation of evidence was filed.

Disposition of Case by Trial Court

The court below determined that the equal protection of the laws guaranteed by the Fourteenth Amendment was denied appellee by the statute (R. 264) and that filling stations were not stores within the meaning of the statute (R. 263-276). No conclusions of law separate from the opinions of the court were made (R. 287).

Findings of Fact

In view of the stipulation the court found it unnecessary to repeat the entire stipulation as findings of fact, but summarized certain facts appearing from the stipulation considered to have special importance in relation to the discussion in the opinions of the court (R. 276-287).

Final Judgment

The court overruled the motion to dismiss, and awarded a permanent injunction against the enforcement of the statute against the appellee and required appellant to account to appellee for the money paid (R. 288).

The Stipulation of Evidence

The stipulation of evidence on behalf of appellee shows that by reason of the large number of units operated by gasoline companies, of the total store tax of $569,-693.00 gasoline stations pay $486,168.00, or 85.3%; that of gross sales, other businesses made 93.8% of the sales and gasoline stations, 6.2% (R. 145), from which it may be computed that appellee pays 42% of the entire store tax; that the gross sales per unit for gasoline stations are much less than the gross sales per unit for other lines of merchandise (R. 196, 171, 148); the average net earn-

ings of company-owned stations, as shown by books of appellee, for 1930, 1931, 1932, and eight months of 1933, are, respectively, $3,000.98, $3,641.25, $1,782.78, profit, and $8.73, loss (R. 151); individual records of business of the agency stations are not kept (R. 169) but from the books of appellee computations were made showing (R. 170): the average profit for agency outlets for 1932, $89.75; the average loss for the first six months of 1933, $62.97 (R. 171). Such computation by classes of outlets for 1931 is shown by "Table No. 5" (R. 302A), and the loss for the first six months of 1933 is shown by "Table No. 7" (R. 302B), and the average profits for 1932 are shown by "Table No. 6" (R. 280A).

The computation of profit or loss is from the marketing operations in the State of West Virginia. Two factors are determinative: first, the gross operating revenues from the sale of products within the State, and, second, the expenses of operation. The expenses include the refinery billing costs of products delivered to the marketing departments in the State. Such costs are not the actual production, transportation and refining costs (R. 214). The company's books show refinery losses, including loss at the Parkersburg refinery, based on prices at which petroleum is billed the refinery (R. 176-7); such prices do not purport to be the actual cost of the production of such petroleum by plaintiff's affiliates, and no showing of such actual cost to any affiliate of the plaintiff of the production and transportation of petroleum delivered to the plaintiff is made in the stipulation. The refinery prices are fixed from time to time by the New York office of appellee and approximate those commonly reported as open market prices (R. 207-8). The refinery billing prices of the company have not been based upon the costs of production in the company's refineries (R. 177).

Posted retail prices of petroleum products of appellee are fixed from the New York office of appellee. Posted prices of motor fuel change from time to time during the year. There were eight changes during 1932 and five changes in 1933 to the date of stipulation, including an increase of 1½¢ per gallon during the month of May, 1933 (R. 208). Such prices posted by the principal dealers in West Virginia in general are uniform (R. 77-78, 183-184). These prices are posted by the distributors of gasoline singly or with other distributors (R. 295-6).

Appellant, being advised that appellee was a mere subsidiary of Standard Oil Company, a New Jersey corporation which owned all of the capital stock of appellee, and that appellee was not engaged in the business of producing and transporting crude petroleum but only in refining and distributing petroleum products, for the purpose of preparing stipulation, called on appellee for information concerning activities of Standard Oil Company in all branches from the taking of leases, drilling for petroleum, on through the refining (R. 211-212). Appellee declined to furnish the requested information, stating that Standard Oil Company, the New Jersey corporation, owned all of the stock or an interest in many companies throughout the world, and that, "The profit or losses sustained by many of these companies, in our opinion, will add nothing of value to the study being made of our business in West Virginia." Information was given of computed loss of Carter Oil Company, a subsidiary of Standard Oil Company of New Jersey, the Delaware corporation, on petroleum furnished appellee at Parkersburg, ascertained by determining the company's (Carter's) loss per barrel of all oil handled by it and applying the same to the gallonage so sold and delivered (R. 209). Information was also given of profit accruing to appellee or its affiliates through stock owner-

ship in Oklahoma Pipeline Company and Ajax Pipeline Company on oil transported to Parkersburg, likewise computed on all business of said pipeline companies (R. 209); information was given that a subsidiary of Standard Oil Company, the New Jersey corporation, owned approximately 20% of the stock of Atlas Supply Company, that the gross revenue of appellee from sales of tires and tubes sold by Atlas Supply Company to plaintiff during the year 1932 as $299,084.85 and stated that the subsidiary received dividends from stock holdings in Atlas Supply Company from West Virginia sales of approximately $11,323.71.

It was stipulated that if witnesses competent to testify concerning the financial affairs of plaintiff and its affiliates were examined with respect to such desired information, they would refuse to give such information and assign as reasons therefor that "such information is immaterial to the matters involved in this cause," and that the position of appellee was that "any information concerning matters outside of the marketing transactions of the plaintiff are therefore immaterial to the issues raised herein" (R. 210).

The above stipulation resulted from the charge of the appellant (R. 217-218) in the amended answer that the principal purpose of the operation of the many companies of the Standard Oil group is the substantial control of the production and marketing of petroleum and natural gas, and that the refining and wholesale and retail distribution is but an incident in the production and transportation of crude petroleum and natural gas, and that the inter-relations of the various companies are such as to permit the crediting or charging of such companies with profits or losses among the various companies, practically at will (R. 127-128). Appellant called

upon appellee for strict proof of the business relations between appellee, Standard Oil Company of New Jersey, a Delaware corporation, and Standard Oil Company, a New Jersey Corporation, and all other parent, affiliate or subsidiary companies in support of any allegations of confiscation (R. 128).

Affiliates of appellee produce in West Virginia annually, largely within one hundred miles of the Parkersburg refinery, crude oil sufficient to make 6,100,000 gallons of commercial motor fuel, none of which crude oil is utilized at the Parkersburg refinery. Affiliates produce in West Virginia 18,000,000 gallons of absorption gasoline suitable for blending and making motor fuel. The Parkersburg refinery uses none of this absorption gasoline. It is sold by said affiliates in large measure to other affiliates, and through brokers to other companies and not used for the West Virginia business (R. 207).

On charging a burden of taxation in West Virginia, appellee claims to have paid, in 1932, $1,963,262.57 taxes, amounting to 19.2% of its gross revenues from its West Virginia marketing business (R. 17). Of this amount approximately $1,818,476.84 (less $5.00 for each bulk plant and $1.00 for each station) is gasoline gallonage tax collected under Article 14, Chapter 11, Code of West Virginia (R. 105-118) which appellant contends is a consumers' tax and not a tax upon appellee (R. 83). Other taxes paid the State of West Virginia by appellee for the year 1932 were $81,066.58 (R. 203).

Appellee denies that the chain filling stations enjoy the recognized advantages which ordinarily characterize other chain store operations (R. 22-26). The record shows that substantially all of the petroleum products marketed in West Virginia by appellee come from

appellee's own refineries (R. 147); distribution by appellee in its marketing operations from single warehouses to numerous stores (R. 152); appellee has available abundant capital (R. 24); company and agency stations have a greater turnover of business than individual stations (R. 167); appellee's marketing business has a simplified and consolidated administrative and bookkeeping system (R. 162, 181-2); specially trained personnel (R. 183); distinctive trade names for products (R. 187); unified advertising (R. 185), such advertising extending from Maine to Louisiana (R. 300). The entire record shows specialization in its marketing by appellee, and standardization (R. 212). Appellee's and affiliates' business is highly integrated, comprising participation in the petroleum industry from production of the crude to retail distribution of refined products (R. 212).

Appellee sells gasoline to independent dealers at three cents per gallon below posted prices (R. 173). The deliveries to agency stations are made at two and one-half cents below posted prices with a further one cent deduction for lease rental, making in all three and one-half cents below posted prices (R. 168). The man-hour sales at company-owned stations were $2.66, at agency stations $2.64, and at individually-owned stations $2.44 for the year 1932 (R. 184). The percentage of utility charges to gross sales were: company-owned stations 1.88, agency stations 1.42 and individually-owned stations 2.20 (R. 184-185). For the year 1932 the gross sales of approximately 2,000 non-chain gasoline stations amounted to $5,158,000.00, while gross sales of 2,453 chain gasoline stations (two or more) amounted to $15,198,638.94 (R. 145).

It appears that Sinclair Refining Company, Ashland Refining Company, Pure Oil Company, Gulf Refining

Company, Standard Oil Company, The Great A. & P. Tea Company, and the Kroger Grocery & Baking Company are all of the companies in West Virginia which operate as many as seventy-five units (R. 142-3-4). Showings of operating losses of Sinclair Refining Company, Pure Oil Company and Gulf Refining Company computed from book prices, no actual cost shown, and losses of Ashland Refining Company are stipulated (R. 214-224).

Certain competitive situations showing the experience of other companies operating less units and paying less tax per unit than appellee are shown (R. 190-195). Statements concerning revenues and chain store taxes on certain of appellee's stations and other stations in the same localities are likewise shown (R. 234-37).

In the Senate of the Legislature of West Virginia during the enactment of the act, an amendment was proposed: "that the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products" (R. 119). The proposed amendment did not carry (R. 122).

SPECIFICATION OF ERRORS RELIED UPON

Appellant will rely upon the assignment of errors filed with the petition for appeal (R. 291, 292) and upon the points stated to be relied upon set forth in the statement filed under Rule 13, Paragraph 9 (R. 298, 299), which are as follows:

Assignment of Errors

(1) The court erred in overruling defendant's motion to dismiss plaintiff's bill of complaint for want of jurisdiction.

(2) The court erred in holding, as a conclusion of law, that the several filling or service stations owned and/or operated by plaintiff, are not stores, within the meaning of the term "store" as defined in the "Chain Store Act" House Bill No. 112 (Chapter 36, Acts of the West Virginia Legislature, 1933, Regular Session).

(3) The court erred in holding as a conclusion of law that the enforcement of said House Bill No. 112 (Chapter 36, Acts of the Legislature of West Virginia, 1933, Regular Session), against the plaintiff denies the plaintiff the equal protection of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

(4) The court erred in awarding the permanent injunction prayed for in said bill of complaint.

Statement of Points to Be Relied Upon

Point I.

The alleged questions of constitutionality under the Constitution of the United States have been

decided adversely to the contentions of the appellee so consistently that such questions are now insubstantial and frivolous, and the suit is one against the State of West Virginia for the maintenance of which, by reason of the Eleventh Amendment to the Constitution of the United States, there is no Federal jurisdiction.

Point II.

The classification of the subject matters of taxation of House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, is reasonable and well founded in fact and law, and the imposition of the taxes thereof upon the appellee does not deprive the appellee of property without due process of law or deny the appellee the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Point III.

The title of said House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, gives a fair and reasonable index to all of the purposes of the act and complies with the requirements of Section 30, Article VI of the Constitution of West Virginia.

Point IV.

The filling stations and bulk plants for the operation of which the appellee was required to pay the taxes provided by said House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, are stores or mercantile establishments owned, operated, maintained and/or controlled by the appellee within the meaning of said act.

Point V.

The Constitution of West Virginia does not prevent the reasonable classification of the subject matters of taxation and the imposition of the taxes provided by House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, does not deprive the appellee of property without due process of law in violation of the provisions of Section 10 of Article III of the Constitution of West Virginia.

Point VI.

The imposition of the taxes provided by House Bill No. 112 (Chapter 36), Acts of the Legislature of West Virginia, Regular Session, 1933, upon the appellee is not violative of the "equal and uniform" provision of the Constitution of West Virginia, Section 1, Article X as amended in 1932, and no part of said section of the Constitution of West Virginia inhibits the imposition of graduated taxes upon classified subject matters of taxation.

SUMMARY OF ARGUMENT

I.

Appellant's motion to dismiss the bill of complaint should have been sustained.

(a) If the act complained of (H. B. 112) be unconstitutional, the suit against appellant, a state officer, is a suit against the State of West Virginia, and, because of the Eleventh Amendment to the Constitution of the United States, may not be maintained.

Ex parte Young, 209 U. S. 123, 149 *et seq.*
Ex parte Ayres, 123 U. S. 443, 487.
Fitts v. *McGhee,* 172 U. S. 516, 525.
Massachusetts State Grange v. *Benton,* 272 U. S. 525, 529.
De Pauw University v. *Brunk,* 53 Fed. (2d) 647, 652, affirmed 285 U. S. 527.
Herkness v. *Irion,* 11 Fed. (2d) 386, 389.

(b) In order that federal jurisdiction may be sustained in an action against a state officer because of unconstitutionality of statute under which officer acts such unconstitutionality must be predicated upon the Federal Constitution.

Stratton v. *St. Louis & Southwestern Railroad,* 282 U. S. 10, 15.
Louisville & Nashville Railroad Company v. *Garrett,* 231 U. S. 298, 304.
Siler v. *Louisville & Nashville Railroad,* 213 U. S. 175, 192.

(c) The question of unconstitutionality under the Federal Constitution must be substantial. A federal question may be plainly unsubstantial either because it

is obviously without merit or because its unsoundness so clearly results from previous decisions of the court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.

Ex parte Poresky, 290 U. S. 30, 31.
McGilvra v. *Ross,* 215 U. S. 70, 80.
Leonard v. *Vicksburg S. & P. R. Co.,* 198 U. S. 416, 422.
Zucht v. *King,* 260 U. S. 174, 176.

(d) The federal questions alleged are:

(1) Arbitrary and unreasonable classification (chain store taxation), and

(2) Confiscatory rates of taxation.

The contention that chain store taxation is arbitrary, unreasonable and discriminatory has been uniformly resolved by the Supreme Court of the United States adversely to the contention of appellee.

Board of Tax Commissioners v. *Jackson,* 283 U. S. 527, 537.
Liggett v. *Lee,* 288 U. S. 517, 532.
Great A. & P. Tea Company v. *Morrissett,* 284 U. S. 584.
Great A. & P. Tea Company v. *Maxwell,* 284 U. S. 575.

Even though the taxation may appear oppressive, the Supreme Court of the United States has uniformly held that the responsibility of the legislature therefor is to the people and not to the courts.

A. Magnano Company v. *Hamilton, Attorney General,* 291 U. S. ___; 78 L. Ed. (Adv.) 712, 715.
Veazie Bank v. *Fenno,* 8 Wall., 533, 548.
McCray Refrigerator Company v. *United States,* 195 U. S. 27, 51, 61.
Patton v. *Brady,* 184 U. S. 608, 623.
Treat v. *White,* 181 U. S. 264, 269.
Kehrer v. *Stewart,* 197 U. S. 60, 70.
Alaska Fish Company v. *Smith,* 255 U. S. 44, 48.
Postal Telegraph Co. v. *Charleston,* 153 U. S. 692, 699-700.
Austin v. *Board of Aldermen,* 7 Wall., 694, 698.
Green v. *Frazier,* 253 U. S. 233, 239.

II.

(a) The bulk plants and filling stations of appellee are operated as an integrated chain with all of the so-called benefits characterizing chain store operations considered in previous chain store cases, and the basis of classification of the act in question is reasonable and proper.

Board of Tax Commissioners v. *Jackson,* 283 U. S. 527, 537, 541.
Louis K. Liggett Company v. *Lee,* 288 U. S. 517, 532.
Liggett v. *Amos,* 104 Fla. 609, 619; 141 So. 153, 157.
Southern Grocery Stores v. *South Carolina Commission,* 55 Fed. (2d) 931, 933.
Great Atlantic & Pacific Tea Company v. *Morrissett,* 58 Fed. (2d) 991, 993.
Great A. & P. Tea Company v. *Morrissett,* 284 U. S. 584.

J. C. Penny Stores v. *Mitchell,* 59 Fed. (2d) 789, 791.

Great A. & P. Tea Co. v. *Maxwell,* 199 N. Car. 433, 440; 154 S. E. 838, 842.

Great A. & P. Tea Co. v. *Maxwell,* 284 U. S. 575.

F. W. Woolworth Co. v. *Harrison,* 172 Ga. 179; 156 S. E. 904, 905.

Commonwealth v. *Bibee Grocery Co.,* 153 Va. 935, 939; 151 S. E. 293, 294.

(b) The basis of classification of the act being valid, the determination of the rate of taxation is for the legislature and not the courts.

A. Magnano Co. v. *Hamilton, Attorney General,* 291 U. S. ---; 78 L. Ed. (Adv.) 712, 715.

Veazie Bank v. *Fenno,* 8 Wall., 533, 548.

McCray Refrigerator Co. v. *United States,* 195 U. S. 27, 51, 61.

Patton v. *Brady,* 184 U. S. 608, 623.

Treat v. *White,* 181 U. S. 264, 269.

Kehrer v. *Stewart,* 197 U. S. 60, 69.

Alaska Fish Company v. *Smith,* 255 U. S. 44, 49.

Postal Telegraph Company v. *Charleston,* 153 U. S. 692, 699.

Austin v. *Board of Aldermen,* 7 Wall., 694, 699.

Green v. *Frazier,* 253 U. S. 233, 240.

Best Foods, Inc. v. *Welch,* 34 Fed. (2d) 682, 686.

A. Magnano Company v. *Dunbar,* 2 Fed. Supp. 417, 419.

Clay Products Company v. *U. S.,* 52 Fed. (2d) 1033, 1034.

Sperry & Hutchinson Co. v. *Melton,* 69 W. Va. 124, 125-126; 71 S. E. 19, 20.

Sperry & Hutchinson Co. v. *Blue,* 202 Fed. 82, 89.

Interstate Company v. *Richardson,* 177 Ga. 9, 15; 169 S. E. 373, 376.

Erwin v. *City of Omaha,* 118 Neb. 331, 336; 224 N. W. 692, 694.

Fleischmann Co. v. *Conway,* 168 La. 547, 551; 122 So. 845, 847.

(c) Even if the rates of taxation involved were for judicial determination, which they were not, the appellee by refusing upon demand to make a full showing of the profits or losses of its business and the business of all affiliated companies as related to the West Virginia business of appellee has failed to make out a case of confiscation.

Dayton Power & Light Company v. *Public Utilities Commission,* 291 U. S. ---; 78 L. Ed. (Adv.) 832, 843.

Columbia Gas & Fuel Company v. *Public Utilities Commission of Ohio,* 291 U. S. ---; 78 L. Ed. (Adv.) 885, 891.

Western Distributing Company v. *Public Service Commission of Kansas,* 285 U. S. 119, 124.

Smith v. *Illinois Bell Telephone Company,* 282 U. S. 133, 162.

III.

Under the West Virginia decisions the title of the act relating to stores is sufficient to sustain the entire enactment applying to stores and mercantile establishments.

Leonhart v. *Board of Education,* (W. Va., 1933) 114 W. Va. ---; 170 S. E. 418, 419.

State ex rel. Hallanan v. *Thompson,* 80 W. Va. 698, 700; 93 S. E. 810, 811.

Brozka v. *County Court,* 111 W. Va. 191, 192; 160 S. E. 914, 915.

Bent v. *Weaver,* 108 W. Va. 299, 301; 150 S. E. 738, 739.

IV.

Gasoline and motor oil are merchandise and the bulk plants and filling stations for which appellee paid the taxes involved in this action are stores or mercantile establishments owned, operated, maintained and/or controlled by appellee.

Midwestern Petroleum Corporation v. *Board of Tax Commissioners,* (Ind., 1933) 187 N. E. 882, 888. Rehearing denied, 191 N. E. (Adv.) 153.

Gunther v. *Atlantic Refining Company,* 277 Pa. 289, 293; 121 Atl. 53, 54.

Mellitz v. *Sunfield Company,* 103 Conn. 177; 129 Atl. 228, 231.

Charleston Oil Company v. *Poulnot,* 143 S. C. 283, 291; 141 S. E. 454, 457.

Abbott v. *Steigman,* 263 Mass. 585, 588; 161 N. E. 596, 597.

Viquesney v. *Kansas City,* 305 Mo. 488, 498; 266 S. W. 700, 703.

City of Troy v. *Harris,* 102 Mo. App. 51, 59; 76 S. W. 662, 665.

Gasoline Company v. *St. Louis,* 326 Mo. 435, 445; 32 S. W. (2d) 281, 284.

Southern Grocery Stores v. *South Carolina Commission,* 55 Fed. (2d) 931, 933.

Craig v. *Pattison,* 74 Miss. 881, 884; 21 So. 756, 757.

21 Corpus Juris, Subject, "Mercantile Establishment," page 904.

V. AND VI.

Neither the due process clause (Section 10, Article III) nor the equal and uniform clause (Section 1, Article X) of the Constitution of West Virginia requires abstract equality or uniformity in taxation, but the subject matter of taxation may be classified and the act here involved violates neither of said provisions of the State Constitution.

Eureka Pipe Line Company v. *Hallanan,* 87 W. Va. 396, 411; 105 S. E. 506, 513.

Hope Natural Gas Company v. *Hall,* 102 W. Va. 272, 277, 279; 135 S. E. 582, 583.

Hope Natural Gas Company v. *Hall,* 274 U. S. 284, 289.

Sperry & Hutchinson v. *Melton,* 69 W. Va. 124, 127; 71 S. E. 19, 21.

Laing v. *Fox,* (W. Va., 1934) 175 S. E. (Adv.) 354, 355.

ARGUMENT

I.

The Motion to Dismiss Because of Want of Federal Jurisdiction Should Have Been Sustained.

The bill alleges diversity of citizenship (R. 3), but from a reading of the bill it is clear that no acts of the appellant apart from his duties under the act in question are alleged. If the act be constitutional, then appellant's acts are official acts and the suit is one against the State of West Virginia, which, because of the Eleventh Amendment to the Constitution of the United States, may not be maintained. *(Herkness* v. *Irion,* 11 Fed. (2d) 386, 389; *Ex parte Young,* 209 U. S. 123, 149 *et seq.).*

The principle that if the act be unconstitutional no one then acts for the state in purporting to enforce such act, and the suit becomes one against the individual and not against the state, is recognized. *(Smyth* v. *Ames,* 169 U. S. 466, 518-9.) This but emphasizes that diversity of citizenship is not the basis of the alleged federal jurisdiction, but that the jurisdiction purported to be averred is that of Section 266, as amended, of the Judicial Code, grounded in the alleged unconstitutionality of a state law under which a state officer acts.

The alleged unconstitutionality which will sustain the federal jurisdiction must be unconstitutionality under the federal constitution. *(Stratton* v. *St. Louis & Southwestern Railroad Co.,* 282 U. S. 10, 15.)

The federal question must be a substantial one, otherwise the jurisdiction fails. *(Louisville & Nashville Railroad Company* v. *Garrett,* 231 U. S. 298, 304.)

It is recognized that jurisdiction is determined from the allegations of the bill and not by the final disposition of the case, and may exist if the question presented be substantial, even though the final decision be adverse to the contentions of the proponent thereof. (*Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 508; *Mosher* v. *Phoenix*, 287 U. S. 29, 30.) That does not mean, however, that a question which will sustain jurisdiction is presented merely because the bill contains empty averments that such constitutional questions are presented. (Compare *Sugarman* v. *U. S.*, 249 U. S. 182, 184.)

A reading of the bill shows that so far as federal questions are concerned, appellee purports to present only two: (1) denial of equal protection of laws in the chain store classification as applied to appellee's business, and (2) the deprivation of appellee of property without due process of law because of the alleged high rate of taxation, contrary in each instance to the provisions of the Fourteenth Amendment.

A substantial question of equal protection of the laws was presented in the case of *Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, and, because of the difference of rates based upon county lines, in *Liggett* v. *Lee*, 288 U. S. 517, (substantially the same questions not having previously been presented to the Court) but when a question has been foreclosed by prior decisions of the Court, the question may no longer be substantial. (*Ex parte Poresky*, 290 U. S. 30, 31; *Zucht* v. *King*, 260 U. S. 174, 176.)

True, appellee alleges that neither of these cases involved filling stations and makes the empty averment that chain filling stations and bulk plants do not enjoy the so-called advantages of chain stores considered in the

previous cases. Yet, from the facts stated in attempting to deny such advantages, the actual presence of the so-called advantages appears from the face of the bill. For instance, centralized management (R. 6-7), quantity buying or the equivalent thereof, and mass process of distribution, state-wide market (R. 23); producing and distributing its own products, equivalent to buying for cash at discount (R. 7, 23-24); abundant supply of capital (R. 24-25); trained personnel (R. 19); distribution from single warehouse to numerous stores (R. 8, 24); unified national advertising (R. 26); specialization of merchandise (R. 26); standardization in operations (R. 12, 26). A consideration of the entire bill shows a business more extended, more highly specialized and more integrated perhaps, than those shown by the bills in the previous chain store cases.

From a reading of the bill it would seem that appellee's efforts to show that its methods of doing business are no different from those of other single units are summarized by the observation made in the opinion in the case of *Liggett* v. *Lee*, 288 U. S. 517, 532, wherein, in commenting upon similar arguments presented in that case and referring to the case of *State Tax Commissioners* v. *Jackson*, 283 U. S. 527, it was said:

> "This is but a reiteration of the contention made and overruled in *State Board of Tax Comrs.* v. *Jackson*, 283 U. S. 527. It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the legislature may make the difference in method and character of the business the basis of classification for taxation. In their bill the complainants aver that the fact

situation in Florida at the date of suit differed materially from that set forth in the *Jackson* case. Each of the features of chain store operation enumerated in this court's opinion is singled out, and as respects each the averment is that as to some chain store operators, or some operators of individual stores, the present case differs from the *Jackson* case.

"In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental."

And, at page 533:

"As we have held, gradation of the tax according to the number of units operated cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary; * * *."

The decisions of this Court in the cases of *Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Liggett* v. *Lee*, 288 U. S. 517; *Great A. & P. Tea Company* v.

Morrissett, 284 U. S. 584; *Great A. & P. Tea Company* v. *Maxwell,* 284 U. S. 575; and the decisions of the Federal Courts of the Fourth Circuit, in which is the State of West Virginia, in cases of *Great A. & P. Tea Company* v. *Morrissett,* 58 Fed. (2d) 991, and *Southern Grocery Stores* v. *South Carolina Commission,* 55 Fed. (2d) 931, foreclose the question of the propriety of classifying multiple ownership as distinguished from individual ownership for purposes of taxation in favor of the validity of such classification and the gradation of taxes.

If there be no question of the propriety of classification, the alleged question of judicial review of legislative determination of rates of taxation, the legality of which can not be questioned otherwise, is likewise foreclosed. The bill particularly alleges that the act is a tax measure (R. 27). The due-process-of-law clause of the Fourteenth Amendment is not a limitation upon the taxing power, as such, of the legislatures of the states. It is a limitation only when the conclusion is compelled that the act does not involve the exercise of the taxing power, but constitutes the direct exercise of a different and forbidden power, and is a mere disguise for the exercise of another power which does not exist. *(A. Magnano Company* v. *Hamilton,* 291 U. S. ---, 78 L. Ed. (Adv.) 712, 715.)

The tax may not be judicially stricken down simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses. *(A. Magnano Company* v. *Hamilton,* 291 U. S. ---, 78 L. Ed. (Adv.) 712, 715; *Alaska Fish Company* v. *Smith,* 255 U. S. 44, 48; *McCray Refrigerator Company* v. *United States,* 195 U. S. 27, 52-61; *Kehrer* v. *Stewart,* 197 U. S. 60, 70.)

The allegations of the bill are that appellee's filling station business will be burdened and appellee will be required to cancel a part or all of its outlet contracts. The bill does not allege that any power other than the taxing power is exercised in the act, or that the taxing power is used as a disguise for the exercise of some prohibited power, but merely alleges that the tax is burdensome and oppressive (R. 28).

It is believed that the questions of classification, of the gradation of rates thereunder and of the amount of the rates of taxation have been so foreclosed by previous decisions of this Court as to cause such alleged questions now to be so frivolous and unsubstantial as not to sustain the federal jurisdiction alleged.

II.

The Bulk Plants and Filling Stations of Appellee Are Operated as an Integrated Chain with All of the So-called Advantages Characterizing Chain Store Operations Considered in Previous Chain Store Cases, and the Basis of Classification Is Reasonable and Proper.

It can not be doubted that appellee's filling stations and bulk plants are operated as a chain. Any attempt at denial but accentuates the inescapable fact. And that such methods of merchandising constitute a form and method of merchandising apart from the practices of individually operated units becomes a matter of common knowledge, not requiring proof but judicially recognized. In the case of *Liggett* v. *Lee,* 288 U. S. 517, 532, the Court, commenting upon the earlier case of *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, said:

> "This is but a reiteration of the contention made made and overruled in *State Board of Tax Comrs.*

v. *Jackson*, 283 U. S. 527. It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the legislature may make the difference in method and character of the business the basis of classification for taxation. In their bill the complainants aver that the fact situation in Florida at the date of suit differed materially from that set forth in the *Jackson* case. Each of the features of chain store operation enumerated in this court's opinion is singled out, and as respects each the averment is that as to some chain store operators, or some operators of individual stores, the present case differs from the *Jackson* case.

"In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental. While incidents of the operation of the one may be quite similar to those found in the other, there is a clear distinction between one owner operating many stores and many owners each operating his own store with a greater or less measure of co-operation voluntarily undertaken. The legislature may make the distinction the occasion of classification

for purposes of taxation. Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed. It is needless to repeat what was said in the *Jackson* case to the effect that the difference between the subjects taxed need not be great, and that if any reasonable distinction can be found the duty of the court is to sustain the classification embodied in the law."

And, at page 533:

"As we have held, gradation of the tax according to the number of units operated cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary; * * *."

Yet, if the characteristics of chain store operation considered in the *Jackson* case be determinative, they or their full equivalents are presented in the methods practiced by appellee. If anything, the gasoline and motor oil business is even more highly integrated than the business of chains handling other types of merchandise. Appellee and its various affiliates handle these products from the earliest stage of production to the final stage of retail distribution (R. 175). In the *Jackson* case, among others, the following so-called advantages were considered:

(1) Ability to make large purchases,
(2) The advantage of cash buying and discounts,

(3) Skill in buying,
(4) Supplying of numerous stores from a single warehouse,
(5) Abundant capital,
(6) Pricing and sales policies resulting in slightly lower prices,
(7) More rapid turnover,
(8) Cheaper and better advertising,
(9) Superior management,
(10) Standardization in matters of display,
(11) Standardization in store management,
(12) Special accounting methods.

The existence of practically all of these so-called advantages, or their equivalents, appears from the bill and stipulation. (1) Appellee refines its own products (R. 146-7), acquires the crude petroleum from an affiliate (R. 175). "The market of the plaintiff and its predecessor company for the distribution of petroleum products has always been state-wide in scope" (R. 23). Appellee's and the parent New Jersey corporation's business is not merely state-wide, but nation-wide, and practically world-wide (R. 208). Its general advertising covers the territory from Maine to Louisiana (R. 300). (2) "The plaintiff and its predecessor company always engaged in large-scale purchasing, refining and distribution of petroleum products." (R. 23). It is believed that buying from itself or affiliates is an advantage as great as that of obtaining cash discounts, and includes the equivalent of (3) Skill in buying (R. 175, 177). (4) Appellee has warehouses which serve respectively many retail distribution plants (R. 24, 158). (5) "For many years the plaintiff has had available the necessary capital to care for the development and operation of its business." (R. 24). (6) Appellee has a sales policy (R. 158, 162, 180). While it is denied that appellee is enabled thereby to sell at lower prices than other gasoline

companies (R. 25), it appears that there is no competition so far as prices are concerned, and appellee may fix prices from its New York office (R. 208) and, whether appellee follows prices set by others, or others follow appellee's prices, all gasoline distributors adopt substantially the same prices in the same territory (R. 177-8, 295-6) which prices are subject to frequent change (R. 208). It appears that under fear of price wars the smaller companies follow the larger ones in the matter of price (R. 296). In West Virginia appellee is the largest distributor of gasoline and motor oils (R. 199, 204). (7) The chain filling stations have the more rapid turnover (R. 167). (8) Appellee has an advertising policy simplified and unified (R. 26, 185), covering a wide territory from Maine to Louisiana (R. 300). (9) Appellee alleges in the bill that it has a trained operating personnel (R. 19). (10) There is standardization in the matter of display, the stations having uniform painting (R. 169), the products having trade names (R. 187). (11) There is specialization of products. "Plaintiff and its said predecessor company at all times have specialized and concentrated upon the production, distribution and sale of petroleum products." (R. 26). (12) There is standardization of management (R. 146-7,149,181), standardization in training of employees (R. 183), and unified, simplified, and standardized bookkeeping (R. 149, 163, 166). "All bookkeeping work in connection with customer's accounts is performed in the Branch Office." (R. 163).

Some immediate benefits from the systemization are shown by the record. The Standard and agency stations have larger man-hour sales than individual stations (R. 184), lower utility charges (R. 184-5). Perhaps the most significant fact is that, of the 4,453 filling stations operating in the State of West Virginia, 2,453, being approxi-

mately 55% of the whole, constituting the "chain filling stations" sell approximately 75% of all motor fuel, while the remaining 45% of stations, being the individual stations, sell only approximately 25% (R. 145). Included in the 2,453 chain stations are the 1,003 stations of appellee and the 1,119 stations of the four other gasoline companies operating more than seventy-five stations in the State (R. 143), and 331 stations of relatively smaller chains of from two to forty units each. The efforts of appellee to show that its business is not a chain business is, as was said in the case of *Liggett* v. *Lee,* 288 U. S. 517, 532:

> "This is but a reiteration of the contention made and overruled in *State Board of Tax Comrs.* v. *Jackson,* 283 U. S. 527. * * *"

and it was there held:

> "The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental."

In the light of the cases of *Board of Tax Comrs.* v. *Jackson,* 283 U. S. 527, *Liggett* v. *Lee,* 288 U. S. 517, *The Great A. & P. Tea Company* v. *Morrissett,* 284 U. S. 584, *The Great A. & P. Tea Company* v. *Maxwell,* 284 U. S. 575, it would be vain to comment upon each of the distinctions attempted to be set out by appellee. It may be significant to note that in the case of *The Great A. & P.*

Tea Company v. *Maxwell,* this Court affirmed the decision of the Supreme Court of North Carolina, in which case the plaintiff attempted to deny all advantages and benefits and to show lack of proportion between gross sales and the amount of tax as between chain units to which the tax applied and the individual units upon which no tax was imposed, although the defendant in that case did not even introduce evidence to deny the absence of the so-called advantages or the alleged inequalities. Also in the case of *Southern Grocery Stores* v. *South Carolina Commission,* 55 Fed. (2d) 931, the bill was dismissed upon the precedents of the *Jackson* case, *The Great A. & P. Tea Company* v. *Morrissett* and *The Great A. & P. Tea Company* v. *Maxwell,* even prior to the decision of the *Liggett* v. *Lee* case. Likewise the bill was dismissed in the case of *The Great A. & P. Tea Company* v. *Morrissett,* 58 Fed. (2d) 991, District Court, Eastern District of Virginia—three-judge court composed of Judges Parker, Northcott and Soper, Judge Soper dissenting—even prior to the decision of the case of *Board of Tax Commissioners* v *Jackson.*

Likewise here appellee shows certain individual or smaller chain stations which have, in some instances as large or larger gross receipts than some of the stations of the appellee, but which pay a smaller store tax. This contention was disposed of in the *Jackson* and *Liggett* cases, *supra.*

It is true that the per-unit gross sales of filling stations is less than the per-unit sales of other chain stores handling other lines of merchandise (R. 148, 171, 196). Judged by that standard, undoubtedly, in general, the store tax on filling stations is heavier than on other chains (R. 196). That filling stations are stores within the meaning of the act is considered hereafter. It is not

contended by appellant, however, that there may be no classification of stores. That filling stations are a class of stores which may be exempted from the chain store tax without the denial of the equal-protection of the laws to the stores not so exempted, has been held in the cases of *Liggett* v. *Lee,* 288 U. S. 517, and *Southern Grocery Stores* v. *South Carolina Tax Commission,* 55 Fed. (2d) 931. Various classes of stores might be selected for separate treatment. Perhaps grocery stores, hardware stores, clothing stores, drug stores, and others, might be given such separate treatment. That separate treatment might be comparatively lower taxes, heavier taxes, or exemption. But the fact that a broad classification of taxable subject matter might be sub-classified for separate treatment of the sub-classes, does not mean that the same treatment of all is inhibited, though the tax may appear to fall more heavily upon one of the potential sub-classes than upon another. This principle is well expressed in the case of *Botkin* v. *Welsh,* (S. D.) 251 N. W. 189, 214:

> "If the Legislature has power to treat certain classes separately for tax purposes, it would seem to follow that the Legislature, if it desires to do so, may treat them in the same manner. Suppose that the retailers in a state consist of twenty separable and distinct classes or groups and concede that each group is susceptible of distinct and separate tax treatment; then there is no logical reason why the Legislature need deal with these twenty classes by twenty separate laws, and if the Legislature sees fit to deal with them in one comprehensive law under the broader term 'retailers' this does not necessarily mean that the twenty included classes susceptible of separate treatment have lost their nature in that respect, or that all retailers have now become a class

> throughout which uniformity must prevail. It merely means that the Legislature, authorized to treat the twenty classes separately, has elected to treat them alike to the extent that the act so provides, but no farther, and there seems no logical reason why the Legislature, under those circumstances, could not provide in such an act for a tax of 2 per cent. on all retailers with the exception that class five should be entirely exempted, class seven should pay only 1 per cent., and class nine should pay 5 per cent."

So, here, gasoline stations may be susceptible of separate treatment. They are also suceptible of the same treatment. Except for the sale of articles other than petroleum products, gasoline stations are not competitive with stores selling other merchandise. Had the legislature seen fit to do so, it might have enacted a separate chain filling station act, or the chain store rates on filling stations might have been made higher or lower, not only according to gross receipts, but per unit, than on other classes of stores. Under the act involved here the tax per unit is the same. It may just as well be contended that there is denial of equal-protection to the G. R. Kinney Company's business because its average sales per unit are $33,000.00 while the average sales of Sears, Roebuck & Company are $140,000.00 (R. 196). "Gross sales" is not the basis of the classification here involved and such contention does not involve a matter of classification but the matter of the determination of the rate of taxes laid according to an established basis of classification.

The Determination of the Rate of a Legal Tax Is for the Legislature.

The appellee charges want of due process guaranteed under the Fourteenth Amendment because it is said that

the tax virtually confiscates the profits of appellee's marketing business, and (R. 17) charges that for the year 1932, not including the store tax, its taxes were 19.2% of its gross revenues in West Virginia. It is at once apparent that by far the greater part of the taxes claimed to be so paid by appellee is the gasoline gallonage tax. Of all the taxes paid in 1932, including corporation license, gross sales, motor vehicle license, and property taxes, including county and municipal taxes, amounting to $1,963,262.57, $1,817,257.84 [being the amount shown (R. 17) by item 3, License tax on filling stations and bulk distributing stations, and gallonage tax, of $1,818,476.84 less $949.00, being $1.00 for each filling station (1933), and $270.00, being $5.00 for each bulk plant (1933)] was the gallonage tax. The gallonage tax is not a tax on appellee but is an excise tax paid by the consumer. *(Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 480). That such is the character of the West Virginia gasoline gallonage tax is emphasized by the provisions of the gasoline tax statute (Section 20) by which refunds are made to the consumer and not to the appellee seller (R. 117). It is expressly provided (Sec. 17) that when the tax is collected it is the property of the State, and the statute makes it an embezzlement for any distributor collecting the tax not to remit it (R. 115). Thus appellee pays all other taxes of only $146,004.73 of which $118,764.43 is property tax, leaving other so-called indirect taxes of only $27,240.31 upon a gross business of $8,381,195.48 [being the gross revenue for 1932 of $10,198,453.32 (R. 9) less the $1,817,257.84 gallonage tax] or slightly less than one-third of one per cent. Even when the store tax of $240,173.50 be added this percentage is increased only 2.87 per cent, approximately, making the total tax, other than property taxes, in round figures, 3.2 per cent. A tax no greater than that can not be said to be unusually burdensome.

Although the above figures are taken from the figures of Standard Oil Company for 1932, and the so-called gross sales tax was increased by the legislature for the year 1933 approximately 76 per cent, the additional gross sales tax of $11,122.22 (R. 203) would make a negligible addition to the computed percentage.

However that may be, it little concerns this case whether the tax be light or heavy, so long as a lawful taxing power exists and is exercised for revenue purposes, the rate of taxation is a legislative and not a judicial question. This Court has had occasion to consider the charge of oppression in taxation in connection with federal taxes (*Veazie Bank* v. *Fenno,* 8 Wall., 533, 548; *McCray Refrigerator Company* v. *United States,* 195 U. S. 27, 51-61; *Patton* v. *Brady,* 184 U. S. 608, 623) as well as in connection with state taxes (*A. Magnano Company* v. *Hamilton,* 291 U. S. ___, 78 L. Ed. (Adv.) 712, 715; *Kehrer* v. *Stewart,* 197 U. S. 60, 70; *Postal Telegraph Co.* v. *Charleston,* 153 U. S. 692, 699-700), also a tax of the territory of Alaska (*Alaska Fish Company* v. *Smith,* 255 U. S. 44, 48), many times, and has uniformly held that a proper tax will not be disturbed merely because it appears to be burdensome, and has lately expressly held that there is no basic difference between the operation of the Fifth Amendment with respect to Congress and the Fourteenth Amendment with respect to the state legislatures in this respect. (*A. Magnano Company* v. *Hamilton,* 291 U. S. ___; 78 L. Ed. (Adv.) 712, 714). Manifestly the chain store tax here involved as related to gasoline and motor oil sales is not comparable to the tax of fifteen cents per pound upon butter substitutes considered in the *Magnano* case, or to the well known tobacco and liquor taxes, and compares very favorably with the production tax considered in the case of *Swiss Oil Company* v. *Shanks,* 273 U. S. 407.

Even if the Rate of Taxation Were for the Court, Appellee Has Not Made a Showing of Confiscation.

The bill alleges,

> "The plaintiff was incorporated under the laws of the State of Delaware on August 29, 1927, and thereupon acquired the business, property rights and good will of the Standard Oil Company, a corporation of the State of New Jersey." (R. 6).

As the stipulation of evidence was prepared it became apparent that Standard Oil Company of New Jersey, the Delaware corporation, appellee, did not succeed to the business, property rights, and good will of Standard Oil Company, the New Jersey corporation, but merely acquired that part of the New Jersey corporation's business relating to the refining and distribution of petroleum products in seven states, including West Virginia and the District of Columbia (R. 146, 175); that appellee was a mere subsidiary of Standard Oil Company, the New Jersey corporation, which held all of the capital stock of appellee (R. 146). Appellant had charged in his answer (R. 86) that appellee's business was not operated with the view of retail marketing profits, but profits from its general system, including production. When it was learned that appellee was merely a subsidiary in the refining and distribution business, appellant then filed amended answer and charged that appellee was a mere subsidiary of Standard Oil Company, the New Jersey corporation, which owned all of the capital stock of appellee and that the New Jersey corporation headed the Standard Oil group in a multiplicity of inter-related activities in the production, transportation and distribution of petroleum products, and that the purpose of Standard Oil Company, the New Jersey corporation, was the substantial control of the petroleum and natural gas markets, and that the inter-relations of the various com-

panies were such that the book records of the appellee did not disclose the true profits or losses of the Standard group for its West Virginia business. In connection with charges by appellee of confiscation, appellant called upon appellee for strict proof and a clear showing of the business of the Standard group (R. 127-8). Also, for the purposes of the stipulation of evidence, counsel for the appellant called upon counsel for appellee for this information (R. 211). The response was the refusal of the information, except in the very limited particulars which follow.

There is given the loss of Carter Oil Company—which, by stipulation is a subsidiary of appellee (R. 209)—on the petroleum furnished appellee's refinery at Parkersburg (R. 212), not, however, computed from actual costs and selling prices, but by the per barrel loss of Carter Oil Company on all oil handled by it (R. 212). It appears that Carter produces approximately one-third of the petroleum handled by it, and buys the remainder from other producers and royalty owners (R. 175). It is not shown that the producers and royalty owners from whom the Carter Company buys two-thirds of its petroleum are not affiliates of the Standard group or that they do not make profits therefrom. The proportionate part of Carter's petroleum produced and purchased which is delivered to Parkersburg does not appear. It is not definitely stated that there was loss on the petroleum delivered by the Carter Company to the Parkersburg refinery, or whether the losses were occasioned by sales made elsewhere at less favorable prices. To the contrary, it would appear that the losses of Carter Company were not occasioned by the sales to the Parkersburg refinery because (R. 175) it is stipulated:

"The price paid by the Parkersburg refinery for the oil so purchased by it is the posted price

> which the Carter Oil Company pays for its purchased oil, plus an additional five cents per barrel, which amount is intended to cover the expense of purchasing, handling and selling the oil."

Likewise, the computed profits to appellee from two of the pipe line companies transporting the petroleum to Parkersburg are given. This computed price does not show the amount of oil transported by the pipe line companies or the proportionate part delivered to Parkersburg or the comparative lengths of the hauls. From all that appears the per barrel profit may have been computed on a very short haul for most of the oil, while, obviously, the haul to Parkersburg is substantial and may have been much more profitable. It appears (R. 176) that appellee owned stock of Oklahoma Pipeline Company. In the other pipe line company for which some information was given, Ajax Pipeline Company, appellee and its subsidiary, Carter Oil Company, own less than voting control of the stock of Ajax Corporation, which, in turn, owns the stock of the Ajax Pipeline Company. It does not appear from the stipulation whether other affiliates of the Standard group made large profits from the transportation of petroleum to Parkersburg through Ajax Pipeline Company. It appears from the stipulation (R. 176) that the Parkersburg petroleum is transported through the Tuscarora Oil Company, Limited's pipe lines, the stock of which is held by individuals for the benefit of appellee. The profits or losses of Tuscarora Oil Company, Limited, in this connection are not shown. It also appears that the petroleum is transported through Illinois Pipeline Company, Southwest Pennsylvania Pipeline Company, and Eureka Pipeline Company, in which appellee has no interest. It does not appear that the New Jersey corporation or

other of its subsidiaries are not interested in said pipe lines or what profits, if any, were made from the transportation of the Parkersburg oil therethrough. (See amendment to findings of fact, R. 287). The stipulation shows (R. 176) that the transportation charges by all of said pipe lines are fixed by tariffs filed with the Interstate Commerce Commission. It does not appear whether the Interstate Commerce Commission has determined the proper tariffs or whether the pipe line companies have merely filed their tariffs with the Interstate Commerce Commission and such tariffs are followed without investigation by the Interstate Commerce Commission.

It is significant to note that in stating the various interests in said pipe line companies the stipulation purports to show only the interest of appellee and not the interest of Standard Oil Company, the New Jersey corporation, or other affiliates of the Standard Oil group. Except with respect to the Atlas Supply Company, in which it is stipulated (R. 176) that the stock is owned by Stanco, Incorporated, a corporation, the stock of which is entirely owned by Standard Oil Company, the New Jersey corporation, the interests of the New Jersey corporation or other Standard Oil affiliates are not shown, and it is nowhere stipulated or shown that other Standard affiliates do not have interests in the several pipe lines or in the producing and royalty-owning companies from which Carter acquires the petroleum not actually produced by it.

On the other hand the stipulation is clear that the prices upon which appellee computed from its books the figures showing its purported losses and gains are not actual cost prices, but are book prices throughout. First, the price paid by the Parkersburg refinery for oil purchased by it from Carter Oil Company is the posted price plus five cents per barrel (R. 175). While it is

which the Carter Co. pays for its purchased oil

stipulated, "It is agreed that there is at all times a recognized posted market price on the various grades of crude oil produced in the several oil-producing sections of the country, fluctuating with the supply of such oil, which price is adhered to by producers and dealers in buying and selling the same" (R. 177), even if it be concluded that the posted price which Carter Oil Company pays for its purchased oil is the same recognized posted market price, which is not definitely stated, it yet does not appear what relation that posted price has to the actual production cost of the Carter oil. It is stipulated (R. 207):

> "The prices at which petroleum is sold to the plaintiff's refinery at Parkersburg, West Virginia, are ascertained in the manner elsewhere herein set forth *and do not purport to be the full, actual cost of the production of such petroleum by the plaintiff's affiliates and no showing of such actual cost to any affiliate of the plaintiff in the production and transportation of petroleum delivered to the plaintiff is made in this stipulation.*" (Italics ours).

Next, the refinery prices at which petroleum products are billed from the Parkersburg and other refineries of the appellee to the marketing department "are fixed from time to time by the New York office of the company," and approximate those currently reported as open market prices in their respective regional market areas (R. 177). "The refinery billing prices of the company have not been based upon the cost of production in the company's refineries." (R. 177).

The posted prices at which motor fuels and motor lubricants are sold at appellee's stations and agency stations are determined from time to time at the plain-

tiff's principal office in the City of New York, and these prices are ordinarily changed from time to time during the year. During 1932 there were about eight changes, and in 1933, up to the time of the stipulation, there were about five changes including an increase of one and one-half cents during the month of May, 1933 (R. 208), which was after the enactment of the chain store act. It further appears that these retail posted prices are fixed by the principal gasoline companies, singly or with others (R. 295-6) and are in the same localities the same (R. 183-4). See particularly the stipulation taken from the case of *Ashland Refining Company,* being made a part of the stipulation in this case (R. 295, 296):

> "The larger companies from time to time designate what are known as the posted retail prices of gasoline. Among the larger companies this price is substantially uniform and plaintiff endeavors to conform thereto and adopt such posted price as its price. * * *"

On the other hand, in response to the demand of the appellant that full information concerning the business of the appellee Standard Oil Company, the New Jersey corporation, and all affiliates be given (R. 211-212) only the limited information above referred to was given, and it was stipulated that if witnesses competent to testify concerning the desired information be inquired of they would refuse to give the information upon the advice of counsel that such information was "immaterial to the matters involved in this cause," and that "Any information concerning matters outside of the marketing transactions of the plaintiff are therefore immaterial to the issues raised herein; that the details of other businesses and transactions carried on by the plaintiff and/or its affiliates, and profits and losses incurred therein, are

irrelevant to a consideration of the effect of the tax in question upon the marketing operations of the plaintiff." (R. 210).

In its findings of fact the trial court concluded that the stipulation was sufficient to determine that the figures from the company's books correctly show net profits and losses *of the business done at its stations in West Virginia* (R. 284), but further concluded (R. 286):

> "It may be well that the company in normal times derives a profit through its affiliation with other corporations engaged in producing or transporting oil, or through its own activities in the refining of oil in the State of West Virginia, but it does not appear that these transactions *affect the profit or loss of marketing the refined product at wholesale or retail in the state.* * * * *and it is upon the privilege of conducting this business that the store tax is imposed.*" (R. 286). (Italics ours).

Appellant does not here contend that the record does show other profits to appellee, its parent and affiliate companies, but simply that the record is in large measure silent upon the subject of whether profits or losses were made, and that, in alleging substantial confiscation, the burden is upon appellee to show such substantial confiscation, and that it has not borne this burden, when, admittedly, if such be the fact, the means of showing the same were at the disposal of appellee. Confiscation or oppression is not shown by one of a large number of affiliated corporations giving information concerning only a limited part of its business based upon so-called current prices, without at the same time showing actual costs and profits and/or losses of affiliates. Admittedly, appellee is little more than dummy corporation used as

an instrumentality for Standard Oil Company, the New Jersey corporation. Appellee does not even have independent stockholders. It is obvious that the appellee, being the largest gasoline distributing company in the State of West Virginia and being but one unit of Standard Oil Company of New Jersey, which is one of the largest, if not the largest, holding companies in connection with the petroleum industry in the United States, if not in the world, has great influence in determining what the various posted prices shall be from time to time, whether they be producers' prices, refiners' prices or retailers' prices; and that appellee is one of the large companies in West Virginia in a position to make retaliation upon the smaller companies (R. 296), and that no reasonable showing of substantial confiscation can be made by starting with an artificial refinery billing price from the Parkersburg refinery and showing losses or very limited profits from that point to the retail sale of such products, without at the same time making a full and honest disclosure of profits and losses of the Standard group between the production of crude petroleum and its delivery to the Parkersburg or other refineries from which the State of West Virginia is served. (Compare: *Dayton Power & Light Company* v. *Public Utilities,* 291 U. S. ___; 78 L. Ed. (Adv.) 832, 843; *Columbia Gas & Fuel Company* v. *Public Utilities Commission of Ohio,* 291 U. S. ___, 78 L. Ed. (Adv.) 885, 891; *Western Distributing Company* v. *Public Service Commission of Kansas,* 285 U. S. 119, 124; *Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133, 162.)

That appellee's business is conducted on the basis of its general business rather than its business strictly within West Virginia appears from the stipulation (R. 207), showing that affiliates produce sufficient petroleum in the State of West Virginia largely within one hundred miles

of the Parkersburg refinery to refine approximately 6,100,000 gallons of commercial motor fuel, and also produce in West Virginia 18,000,000 gallons of absorption gasoline, the combined production being sufficient to provide approximately fifty per cent of Standard's motor fuel requirements in the State of West Virginia (R. 204), when, as a mater of fact, none of these West Virginia products are used for appellee's West Virginia motor fuel business but are transported from West Virginia to other more distant markets largely for the use of affiliates, while the motor fuel requirements of appellee in West Virginia are supplied from petroleum produced in the mid-continent area necessitating large transportation costs.

Also, that appellee finds advantages in operating its many agency stations with respect to which it complains that the tax is particularly oppressive, appears from the fact that in operating the agency stations, a total allowance of three and one-half cents per gallon from posted price is allowed, being one cent rental and two and one-half cents commission to agent, while in selling the same products to individual dealers only three cents from the posted price is allowed (R. 168, 173). This one-half cent per gallon preference given agency stations over individual dealers would go a long way towards paying the taxes of which appellee complains.

That appellee Standard Oil Company of New Jersey, a Delaware corporation, is a separate corporate entity does not prevent inquiry into the related business affairs of other corporations, particularly the parent company, Standard Oil Company, a New Jersey corporation, when it appears that appellee is a mere instrumentality or adjunct of the New Jersey Corporation. As was aptly expressed in the case of *Federal Trade Commission* v.

Thatcher Manufacturing Company, 5 Fed. (2d) 615, 621, in quoting from the case of *United States* v. *United Shoe Machinery Co.*, 234 Fed. 127:

> " 'Courts of equity will look behind a corporate fiction, and if it clearly appears that one corporation is merely a creature of another, the latter holding all the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice.' "

See Corpus Juris, title "Corporations," Vol. 14, Sec. 26, page 62; Fletcher Cyc. of Corporations, Vol. 1, Sec. 45, page 63; Thompson on Corporations, 3d Ed., Vol. 1, Section 10, pp. 16-18.

The Relation of the Tax Upon Filling Stations and Bulk Plants to the Purposes of the Act.

In the lower court appellee insisted, and will no doubt insist here, that the tax falls so much more heavily, comparatively, upon its business than upon chains handling other lines of merchandise, that it does not bear a reasonable relation to the object of the legislature. The lower court (Opinion of Judge Soper, R. 264) adopted this view, quoting the observations of this Court in the case of *Ohio Oil Company* v. *Conway*, 281 U. S. 146, 159 (R. 255).

The object of the act was the raising of revenue by the imposition of graduated taxes upon multiple ownership and operation of stores. If filling stations and bulk plants are stores within the definition of that term as prescribed by the act, it would seem that the relation

between the application of the act and the object of the legislature is clear and direct.

We have found no decisions of this Court discussing the relation between the act and the object of the legislature in which such observation has been made with respect to the determination of the rate of the tax, and such observations appear to relate to the classification rather than to the determination of the rate of taxation.

By way of illustration, the case of *Ohio Oil Company* v. *Conway,* 281 U. S. 146, involved the classification of petroleum on the basis of gravity, and the imposition of ~~definite~~ rates of taxes accordingly. This basis of classification was sustained.

In *Royster Guano Company* v. *Virginia,* 253 U. S. 412, cited in the *Ohio Oil Company* case, under the Virginia statute an income tax was imposed upon all of the income of Virginia corporations, including income derived by such corporations without the State of Virginia as well as income derived from within the State of Virginia, so long as any part of the income was derived from within the State of Virginia. Although the corporation was organized in Virginia, if all of its business except the holding of meetings was done outside the State of Virginia, no tax was imposed. It was held in that case that there was no reasonable basis for the imposition of the tax on a corporation doing a small part of its business in the State of Virginia and the greater part of its business without the State, on the one hand, and the exemption of a corporation doing no business in the State of Virginia, on the other. The rate of taxation was not involved, but the classification. In *Louisville Gas Company* v. *Coleman,* 277 U. S. 32, 39, likewise cited, a question of classification was involved. This case involved a tax on mortgages having not less than

five years to run, while mortgages maturing in less than five years were wholly exempt. While in the opinion of the Court it was suggested that the rates of taxation might be graduated on the basis of the difference in the maturities of mortgages, the statute was held invalid because of an arbitrary classification, namely, the taxing of mortgages having more than five years to run and the total exemption of those for a lesser period. The case did not involve the rate of the imposition upon the basis of a valid classification.

In the case of *Airway Corporation* v. *Day,* 266 U. S. 71, likewise cited, there was involved a tax upon a corporation engaged in interstate commerce as well as in intrastate commerce. The tax was based upon the total authorized capital stock, without regard to the amount of the stock actually issued and without attempted apportionment between interstate business and intrastate business. This statute was held invalid because it was considered a burden on interstate commerce and, further, for the reason that mere authorized capital stock, regardless of the amount issued, could not constitute a reasonable measure for the imposition of an annual license fee of the character there under consideration.

In *Schlessinger* v. *Wisconsin,* 270 U. S. 230, this Court had under consideration an inheritance tax in which was incorporated a conclusive presumption of transfer in contemplation of death when the transfer was made within six years prior to death. The object of the legislature was obviously an inheritance tax and not a gift tax, and the Court concluded that the establishment of a conclusive presumption was so arbitrary as not to sustain the enactment. It was recognized that a rebuttable presumption might have been created. Had the conclusive presumption been sustained the result would

have been the enactment of a gift tax where the object of the legislature was the imposition of an inheritance tax. See also *Nichols* v. *Coolidge*, 274 U. S. 531.

The case of *Liggett* v. *Baldridge*, 278 U. S. 105, was also relied upon. This case did not involve a tax statute but involved a statutory requirement, purporting to be enacted for the promotion of public health, that only licensed pharmacists should own drug stores. The Court held that there was no relationship between the ownership of a drug store and the public health, since the management of the drug store as distinguished from its mere ownership might reasonably determine whether or not the public health was protected. This statute was a mere attempt to prohibit persons and corporations from engaging in a lawful business under a purported exercise of the police power which had no reasonable relation to the object sought to be attained thereby.

If the thought be that "the relation to the object of the legislature" requires that the tax or the rate of tax be determined by the commercial value of the privilege exercised under the act, or that the taxpayer must have some special benefit from the payment of the taxes other than the maintenance of general government, it is believed that the application of such observations to the case at hand is wholly without support.

In the case of *Nashville C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 268, in upholding a tax upon the storage of gasoline, the proceeds of which were by statute applied to the maintenance and construction of highways, upon a railroad company which did not use the highways, the Court observed:

> "• • • the constitutional power to levy taxes does not depend upon the enjoyment by the tax-

payer of any special benefit from the use of the funds raised by taxation."

It is believed that the classification involved in the case at bar is established by the decisions in the *Jackson* and *Liggett* cases, *supra,* and, the propriety of the classification being established, that the principles of the case of *Magnano* v. *Hamilton, supra,* are applicable, and, the purpose to raise revenue being clear and admitted, the rate of the imposition does not present a judicial question.

State Questions.

Since, should the Court determine that federal jurisdiction is presented, the Court may pass upon all questions involved, whether federal questions or not *(Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298, 303); and since upon appeal this Court may affirm the decree of the trial court from a consideration of the entire record even though the basis upon which the decision of the lower court was made be disapproved *(Stoffregen* v. *Moore,* 271 Fed. 680, 681), we here discuss briefly all state questions involved whether or not directly passed upon by the lower court.

III.

The Title of the Act.

Appellee contends that the title of the act in question contains the word "stores" while the body of the act refers to "stores and mercantile establishments," and that the use of the phrase "mercantile establishments" in the body of the act, if given any further effect than were the word "stores" alone used, would be violative

of the provisions of Section 30 of Article VI of the Constitution of West Virginia, which provides:

> "No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, * * *."

This provision has been considered many times by the Supreme Court of Appeals of West Virginia. The interpretation by said court is found in the recent case of *Leonhart* v. *Board of Education,* 114 W. Va. ---; 170 S. E. 418, 420, wherein the court observed:

> " 'If the title of an act is broad enough to give a fair and reasonable index to all the purposes of the act, it is not necessary to descend to particulars in the title.' *State ex rel. Hallanan* v. *Thompson,* 80 W. Va. 698, 93 S. E. 810. The contents of an act need not be detailed in its title. *Brozka* v. *County Court,* 111 W. Va. 191, 160 S. E. 914. 'If under the one object expressed in the title other incidental or auxiliary objects appear in the act germane to the principal object, the act is valid as to such incidental auxiliary and germane objects. The universal rule of construction is that the title should be construed in its most comprehensive and liberal sense favorable to the validity of any provision of the act.' *State* v. *Haskins,* 92 W. Va. 632, 115 S. E. 720, 722. It is only where it is very clear that a provision of the act is not within the title, liberally construed, that such provision of the act should be held invalid. All of these considerations convince us that we would not be warranted in declaring any portion of the county unit act uncon-

stitutional because not sufficiently designated in the title of the act."

This decision is a culmination of a long line of decisions of the Supreme Court of Appeals of West Virginia to the same end, and accords with the general rule of interpretation of similar constitutional provisions. *County of Carter* v. *Sinton,* 120 U. S. 517-526; 30 L. Ed. 701-4. Whether or not the use of the words "mercantile establishments" has the effect of making more comprehensive the meaning of the word "stores," the title of the act meets the requirements of the provisions of Section 30 of Article VI of the Constitution of West Virginia to sustain the interpretation of the act in question as including gasoline filling stations and bulk plants.

IV.

Gasoline and Motor Oils Are Merchandise and the Bulk Plants and Filling Stations, Including Agency Stations, Are Stores and Mercantile Establishments Owned, Operated, Maintained and/or Controlled by Appellee.

There are number of decisions involving the judicial determination of the question of whether or not filling stations are stores and whether or not gasoline and motor oils are ordinary articles of merchandise. As related to chain store taxation there are, to the best of our information, but two cases, other than the case at bar, passing upon this question. The one *Wadhams Oil Co.* v. *State,* 210 Wis. 448; 245 N. W. 646, on rehearing 210 Wis. 457; 246 N. W. 687, and *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind., 1933) 187 N. E. 882, rehearing denied 191 N. E. (Adv.) 153.

The Wisconsin and Indiana decisions reach opposite conclusions. These cases will be referred to in detail,

but before such consideration of these cases it is believed that a brief discussion of other cases considering filling stations as "stores" and gasoline and motor oils as ordinary merchandise may be helpful.

In the case of *Gunther* v. *Atlantic Refining Company*, 277 Pa. 289, 293; 121 Atl. 53, 54, a contract that "no store building should be erected on the property * * *" was involved. The Atlantic Refining Company proceeded to erect a building with outside appliances "to be used for the sale of oil, gasoline, etc." The Refining Company was enjoined. The Refining Company argued that the building contemplated was not a store within the meaning of the agreement. The court observed:

> "The word 'store' has been broadly defined as a place where merchandise of any kind is kept for sale: Standard Dictionary; 36 Cyc. 1326, and cases cited in footnotes; see also opinion of lower court, affirmed by this court, in *Hoffman* v. *Parker*, 239 Pa. 398,(86 Atl. 864), where it was stated that buildings outwardly designed, adapted and constructed for a trade might popularly be described as stores and would be understood as devoted to retail trade. The defendant proposed to use the premises for the purpose of retailing gasoline and oil for delivery from tanks constructed outside and in front of the building; that such use was for the purpose of trading and came within the designation of a store within the meaning of a clause restricting the premises to residential purposes can hardly be doubted."

In the case of *Mellitz* v. *Sunfield Co.*, 103 Conn. 177; 129 Atl. 228, 231, the restriction on the use of lots 2 and 3 involved was that "no building shall be erected thereon to be occupied for any purpose except stores and dwell-

ings; the store to be used for the sale of ordinary merchandise * * *." The restriction as to lot 1 limited the building to be erected thereon to a dwelling house and the occupancy to the purposes of a dwelling. The defendant on lot 2 conducted a store for the sale of automobile accessories and used lots 2 and 3 for its gasoline station for the sale of gasoline, oil and grease. Upon lot 1 defendant had constructed a crushed stone driveway used in connection with its business on lots 2 and 3 adjoining. The lower court refused the injunction against such use of any of the three lots. The Supreme Court of Errors of Connecticut affirmed the lower court in denying the injunction as to lots 2 and 3 but reversed the lower court and directed that the injunction issue as to lot 1. The court observed:

> "The restriction as to lots 2 and 3 is that no building shall be erected thereon to be occupied for any purpose except stores and dwellings; the store to be used for the sale of ordinary merchandise and the buildings not to contain more than one family beside the store. The sale of automobile accessories from this store located on lot 3 falls exactly within the terms of this restriction. So that the plaintiff's claim that the defendant has violated this restriction must be that the sale of gasoline, oil, and grease in the manner in which defendant's business is carried on is not that of the sale of ordinary merchandise, or that the manner of carrying on the business is not by means of a store. Merchandise is defined as every article of traffic customarily bought and sold for a profit. *Kohlsaatt & Co.* v. *O'Connell,* 255 Ill. 271, 99 N. E. 689, 690. The traffic in these articles of commerce is incredibly large. The automobile ministers to the necessities as well as the recreation and pleasure of a majority of our people. It has ceased to be a luxury, and become a neces-

> sity of modern life. The common understanding would include these articles of commerce within the designation of 'ordinary merchandise.' "

And referring to the case of *Gunther* v. *Atlantic Refining Co., supra,* and *City of Troy* v. *Harris, infra,* further observed:

> "These authorities and the common understanding agree that gasoline, oil, and grease sold for a profit are traffic in ordinary merchandise, and that any one dealing in them under the circumstances of the instant case is a merchant. Does the fact that the restriction is as to a store to be used for ordinary merchandise exclude the doing of this business by the agency of tanks and pumps outside the store? We think this too narrow a construction of this restriction. If the store were a grocery or fruit store, it would not cease to be a store if the major portion of the stock were kept outside the store. The same conclusion must follow as to many lines of business. Whatever is incident to, and a convenience to, the conduct of a store engaged in the sale of ordinary merchandise is permissible so long as it does not conflict with municipal regulation or become a nuisance. Whether the gasoline be sold from pumps located on the piazza of the store or located across the driveway passing the store, it is in either case a part of the business conducted in and from the store."

In the case of *City of Troy* v. *Harris,* 102 Mo. App. 51, 59, 76 S. W. 662, 665, it was held that a corporation selling oil drawn from stationary tanks owned by it and from a wagon tank driven about town is a merchant, within an ordinance defining a merchant to be a person

dealing in the selling of goods, wares and merchandise at any stand or place occupied for that purpose.

In the case of *Charleston Oil Co.* v. *Poulnot,* 143 S. Car. 283, 291; 141 S. E. 454, 457, considering a statute inhibiting the sale of merchandise on Sunday, the Court observed:

> "Under the definitions referred to in the authorities above cited, and in line with the former decisions of this Court, we think there can be no doubt that gasoline and motor oils are embraced in the term 'merchandise' as used in the statute."

In the case of *Abbott* v. *Steigman,* 263 Mass. 585, 588; 161 N. E. 596, 597, there was considered a covenant against the use of certain property for mercantile purposes. It was held that the sale of oil, tires and other automobile accessories in the building erected on the land was plainly a use for mercantile purposes.

In the case of *Gasoline Company* v. *St. Louis,* 326 Mo. 435, 445; 32 S. W. (2d) 281, 284, it was "conceded however, that one engaged in buying and selling gasoline is a merchant."

In the case of *Viquesney* v. *Kansas City,* 305 Mo. 488, 498; 266 S. W. 700, 703, a definition of the word "merchant" as "one making the business of buying and selling the commodities," was, where certain merchants were enumerated, construed as applying to the operators of filling stations, although not expressly mentioned.

In considering a Mississippi statute, in the case of *Craig* v. *Pattison,* 74 Miss. 881, 884; 21 So. 756, 757, the court held that the tax applicable to the business of

conducting a store was applicable to the business considered in said case, although the goods for sale were kept partly in a dwelling and partly in a meat house, and held that the business so conducted was a store within the meaning of the privilege tax imposed.

Appellee relies upon the case of *Wadhams Oil Company* v. *State*, 208 Wis. 318; 245 N. W. 646, on rehearing 210 Wis. 448, 246 N. W. 687, and the lower court followed this case. The decision in the *Wadhams* case purports to apply the well recognized and practically universal rule of statutory construction, that in the absence of any manifestation from the statute of other intent a word used in the statute shall be given its common, ordinary, accepted, popular meaning, which rule is stated in 2 Lewis' Sutherland Statutory Construction (2d Ed.), Section 390:

> "As a general rule the words of a statute are to be taken in their ordinary and popular sense unless it appears from the context or otherwise that they were used in a different sense."

We find no fault with this rule, but question the accuracy of its application in the *Wadhams* case, and in the opinion of the lower court in the case at bar, and believe that its accurate application in the case at bar will lead to the conclusion that filling stations and bulk plants are "stores" within the meaning of the act under consideration.

The only reason for the position taken by the Wisconsin court in the *Wadhams* case is the assumption of fact that:

> "• • • If one were to stop five hundred well-informed intelligent persons traveling into any city and ask them to stop at the first store or

> mercantile establishment where goods, wares, or merchandise were sold or offered for sale, it is quite probable that not a single one would stop at a filling station or service station such as is described in the plaintiff's complaint. * * *'' (245 N. W. 649).

The accuracy of the conclusion of the illustration may be seriously questioned. The position of the Supreme Court of Indiana in the case of *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind. 1933) 187 N. E. 882, 888, appears to be more plausible, wherein, in commenting upon the illustration used in the *Wadhams* case, it observed:

> "It is probably equally true that if five hundred persons were asked for a definition of the word 'store,' they would give substantially the dictinary definition above quoted."

The dictionary definition referred to was that found in Webster's Dictionary defining the word "store" in the commercial use as meaning "any place where goods are kept for sale, whether by wholesale or retail; a shop * * *." The intelligent persons referred to in the *Wadhams* case undoubtedly would know that definition or a reasonable equivalent thereto. It may just as well be assumed that none of the five hundred persons would stop at a wholesale cotton goods house. Many of them have no window display showing their wares, and yet it is not believed that any serious question could be raised to the inclusion of wholesale cotton goods houses in the definition of "store" found in the statute here under consideration. It must not be overlooked that the West Virginia Chain Store Act has its statutory definition of "store" included therein. Section 8 provides:

> "The term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale."

In the case of *Buchanan* v. *Louisville Coal & Coke Co.*, 98 W. Va. 470, 472; 127 S. E. 335, in considering the statutory definition of a ton as two thousand pounds in connection with local custom establishing a ton of two thousand two hundred and forty pounds, the court determined:

> " 'If a statute has given a definite meaning to any particular word no evidence of custom will be admitted to attach any other meaning to it.' "

(Under the Constitution of West Virginia, Section 5, Article VIII, it is the duty of the court to prepare a syllabus of the points adjudicated in each case, the section providing: "* * * and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case.")

It is not contended by appellant that words used in a statute must always be given the dictionary definition. On the other hand, it is believed that so far as words of common use and understanding are concerned, and the word "store" is such a word, dictionary definitions may safely be relied upon to set forth the common, ordinary, accepted and popular meaning of such words of common use. If the common dictionary definitions of words in

common use cannot be relied upon, then where shall the legislatures look for the meaning of the words used by them? Who shall determine the popular meaning? Consider the very question here presented. In *Gunther* v. *Atlantic Refining Company, supra,* the court concluded that the building there considered, a filling station, might *popularly* be described as a store.

And in *Mellitz* v. *Sunfield Co., supra,* in referring to gasoline, oil and grease the court concluded: "The *common understanding* would include these articles of commerce within the designation of 'ordinary merchandise.'" Thus the Pennsylvania and Connecticut courts conclude that filling stations and gasoline and motor oils are within the popular meaning and common understanding of the words "stores" and "ordinary merchandise." These conclusions are supported by the ordinary dictionary definitions of the word "store" of common every day use and acceptation. On the other hand, the *Wadhams* case seems to stand alone, predicated upon what is apparently a misconception of the popular limitation of the word "store."

The decision in the *Wadhams* case appears to have been placed to a considerable degree upon the particular wording of the definition of "stores" under the Wisconsin statute. The definition of the word "store" as used in that statute was:

> "Every person, firm, corporation or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more stores or mercantile establishments where goods, wares or merchandise are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business." (245 N. W. 646, 649).

On rehearing (246 N. W. 688) the court observed:

> "If the Legislature had intended to be all-inclusive, other appropriate language might have been used. In the definition, it might have said, instead of a store or mercantile establishment 'a place,' and inserted after the word 'merchandise' the words 'of any kind,' and phrased the statute as follows: 'Every person, firm, corporation or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more places where goods, wares or merchandise of any kind are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business.'"

And concluded:

> *"So phrased, the statute would have included filling stations and many other establishments not within the terms of the act as we shall see."*

It is very significant that in the definition involved in the West Virginia statute the phrase *of any kind* is used and the definition expressly refers to "goods, wares or merchandise of any kind." Taking the view of the Wisconsin court in the *Wadhams* case it is not unlikely that had the court there had under consideration the West Virginia statute it would have concluded that filling stations were within the terms of the act.

The decision in the *Wadhams* case seems to be unsupported by reason, lexicology or precedent. The view adopted in the case of *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind., 1933) 187

N. E. 882, is supported by reason, lexicology and precedent, as is shown by the cases hereinbefore discussed, the dictionary definitions shown and the sound reasons expressed in the opinion, wherein, in commenting upon the previous decision in the *Wadhams* case, the Indiana court observed:

> "It should be accepted as the rule that non-technical words used in the title of an act, or in the act itself, will be construed according to their ordinary and accepted dictionary meaning, unless an intention to convey some other or different meaning can be gathered from the context. The definition of the word 'store' contained in the body of the act conforms almost exactly to the dictionary meaning, thus indicating the legislative understanding of the word, and it is notable that where similar legislation was enacted in other states where it was desired to exempt filling stations from the operation of the law, they were expressly exempted, which seems to indicate a belief that they would come within the meaning of the word 'stores' if not so expressly exempted.
>
> "It is also contended that because the statute uses the words 'in which goods, wares or merchandise * * * are sold' (section 8), and requires a license to be displayed 'in' the store, the act was not intended to apply and does not apply to establishments where the business is transacted outside of an inclosure and not under a roof. Webster's Dictionary says that the word 'in' is specifically used as indicating a point or place thought of as spatially surrounded or bounded'; and 'in this sense it is used by extension before words only indirectly or vaguely denoting physical surrounding.' To interpret the word as indicating a legislative intention that mercantile establishments that are not under a roof or not within

> an inclosure should not be subject to the requirements of the act would be to ignore the plain language of the act in which it is said, 'The term "store" as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments.'"

The Indiana court in the *Midwestern Petroleum* case had under consideration the exact defintion of "store" embodied in the West Virginia act, except the Indiana statute uses "or" and not "and/or" between the words "maintained" and "controlled," the West Virginia act apparently having been adopted from the Indiana act.

In the cases of *Liggett* v. *Lee*, 288 U. S. 517, 538-9; and *Southern Grocery Stores* v. *South Carolina Commission*, 55 Fed. (2d) 931, 933, the contention was made by the plaintiffs, not that gasoline filling stations were not stores, but that such stations were stores, and that the classification effecting their exclusion was abritrary and unreasonable, resulting in the denial of equal protection of the laws to other classes of stores subject to the tax. In the acts under consideration in those cases filling stations were expressly excluded. In overruling the contentions made in those cases this Court in the *Liggett* case, and Judge Parker speaking for the three-judge district court in the *Southern Grocery Stores* case, did not determine that filling stations were not "stores," but overruled the contentions for the reason that stores were susceptible of classification, and without definitely stating whether or not filling stations were stores, determined that filling stations were susceptible of separate treatment. In the *Southern Grocery Stores* case, 55 Fed. (2d) 931, 933, it is observed:

> "Such stations as a general rule sell only gasoline and other articles of merchandise upon which

> the state collects a heavy excise tax, and it was doubtless for this reason that they were exempted from the tax in question."

Gasoline is in that decision recognized as merchandise, and the language in each opinion is susceptible of the interpretation that filling stations were at least impliedly recognized as stores, which but for the specific exemptions would have been included within the provisions of the respective acts.

If gasoline be merchandise, and this would seem to be true beyond question, the conclusion that the word "store," within the meaning of this act, defined by the act as "any store or stores, mercantile establishment or establishments * * * in which goods, wares or merchandise *of any kind* are sold, either at retail or wholesale," includes gasoline filling stations and bulk plants is inevitable, unless violence be done to the express wording of the statute.

Under ordinary dictionary definitions, which all of the courts in the other cases, other than the Wiconsin court, have recognized as the popular and common understanding meaning of the word "stores," the meaning of that word as used in the statute in question should be clear without the necessity of resorting to extrinsic evidence. However, the plaintiff in its bill charged specifically that it was not the legislative intent to include filling stations within the meaning of the word "stores." (R, 12). If any evidence of the legislative intent other than that found in the words of the statute be pertinent, the journal of the West Virginia Senate shows that while the bill was pending before that body an amendment was proposed, "*Provided, however,* that the term 'store' shall not include filling stations engaged

exclusively in the sale of gasoline and other petroleum products." (R. 119). The proposed amendment was acted upon by the Senate and the amendment was rejected: "So a majority of those present and voting, not having voted in the affirmative, the motion did not prevail." (R. 122). (See *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 174, Appeal Dismissed, 254 U. S. 664; *U. S.* v. *St. Paul, M. & M. R. Co.*, 247 U. S. 310, 318; *Pennsylvania Ry. Co.* v. *International Coal Co.*, 230 U. S. 198, 199; *Finlayson* v. *Shinnston*, 113 W. Va. 434; 168 S. E. 479; Corpus Juris, Title, "Statutes," Vol. 59, Section 605, page 1019).

Hereinbefore we have argued that filling stations are stores within the meaning of the act under consideration, considering the sale of gasoline and motor oil alone. The record shows that the filling stations of appellee also sell automobile tires, batteries, spark plugs and automobile accessories and supplies generally (R. 148). While the trade in the articles of merchandise other than gasoline and motor oil may be a comparatively small part of the gross business (R. 148), in the aggregate such business is appreciable. The agency stations also handle such other articles, though appellee does not admit that for the handling of such other articles of merchandise the agents are in fact agents of appellee. Such agents in handling other articles acquire and sell the same under contracts filed as exhibits (R. 168). It is believed that under the decisions hereinafter referred to, under the next following sub-title, it will appear that the contracts are in reality agency contracts.

The Stations and Bulk Plants Are Those of Appellee.

That the so-called company stations and bulk plants are owned, operated, maintained, and controlled by appellee is stipulated (R. 150).

While it is not directly stipulated that the agency stations are so operated by appellee (R. 150) it is stipulated that the petroleum products there sold remain the property of appellee and that the persons in charge of the stations for the sale of such products are the agents of appellee (R. 148, 168).

Judge Soper in the opinion of the court (R. 242) said:

> "The control of the plaintiff of all of these stations is so complete that the plaintiff does not deny that they are operated by it within the meaning of the act."

On all of these stations appellee has leases (R. 49, 58) and the agency contracts are terminable at will on three days' notice, (R. 57, 66). These features show the control of these stations by appellee. As was held in the case of *Gulf Refining Company* v. *Rogers* (Tex.), 57 S. W. (2d) 183, 186, in discussing the liability of Gulf Refining Company for personal injuries occasioned by conduct of one operating a station under a lease and a so-called dealer agreement:

> "By reserving the right to terminate the contract at will, it retained the means of compelling submission to its orders."

In the case of *Greene* v. *Spinning* (Mo.), 48 S. W. (2d) 51, 57, involving the operation of a filling station under a so-called "authorized service station agreement," wherein it was contended by the oil company that the operator of the station was an independent contractor, the court observed:

> "One of the main criterions, if not the chief one, as to whether the relationship of respondeat

> superior exists, is the right to control, and it is not a question as to whether that control is actually assumed but whether it exists. 2 C. J. p. 424."

See *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 556; 233 S. W. 680, 681; *Barnes* v. *Standard Oil Company,* 167 Wash. 609, 618; 9 Pac. (2d) 1095, 1097; *Maryland Casualty Co.* v. *Kent,* (Tex.) 271 S. W. 929, 931; *Louisiana Oil Corporation* v. *Rayner,* 159 Miss. 783, 793-4; 132 So. 739, 742; *Gulf Refining Co.* v. *Huffman et al.,* 155 Tenn. 580, 588; 297 S. W. 199, 201; *Angell* v. *White Eagle Oil & Refining Company,* 169 Minn. 183, 187; 210 N. W. 1004, 1005-6; *Wilcox & Gibbs Sewing Machine Co.* v. *Ewing,* 141 U. S. 627, 636.

Bulk Plants.

The contention was made below that the bulk plants are only warehouses and that no substantial sales are made at the bulk plants but only deliveries made therefrom on orders or commitments previously taken through the branch office (R. 165). It appears that in addition to supplying its own and its agency stations from the bulk plants, appellee supplies individual dealers, commercial and industrial consumers (R. 163). The gasoline supplied such individual dealers and commercial consumers is approximately one-third of all gasoline sold by appellee (R. 153). The fact that orders may have been taken in advance for the greater part of these products does not deprive the bulk plants of their character as places at which merchandise is sold. As was said in *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind.) 187 N. E. 882, 889:

> "It asserts that the law does not apply to its bulk stations, which are not stores but merely

storage plants or warehouses from which distribution is made for the purpose of supplying appellant's own service stations and making delivery to customers. It is alleged that it maintains an office, and that its wholesale sales are made by telephone or mail or personal contact at this office, which is not situated at the same place as its so-called bulk stations, and that, therefore, no merchandising is done at the bulk places. We cannot take the contention seriously. If it could be sustained, every wholesaler or retailer who transacts business by accepting orders and making deliveries might detach his office from the place where his merchandise is stored and thus exempt himself from the operation of the law."

V. AND VI.

The Act Does Not Violate the Provisions of the Due-Process Clause (Section 10, Article III) or the Equal-and-Uniform Clause (Section 1, Article X) of the Constitution of West Virginia, Neither Requiring Abstract Equality or Uniformity In Taxation, Both Permitting Proper Classification.

Section 10, Article III of the Constitution of West Virginia, 1872, provides:

> "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

The pertinent provisions of Section 1, Article X of the Constitution of West Virginia (as amended November 8, 1932, set out in full, R. 32-33) are:

> "Subject to the exceptions in this section contained, taxation shall be equal and uniform

> throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. * * * (Here follow provisions for classification of property for ad valorem taxes) * * * The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, * * *."

The provisions of said Section 1, Article X prior to the amendment were:

> "Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value; * * * The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

Prior to the adoption of the amendment to said Section 1, Article X the subject of the classification of privileges and occupational taxes under the West Virginia Constitution was considered in the following cases:

In *Sperry & Hutchinson* v. *Melton*, 69 W. Va. 124; 71 S. E. 19, there was involved a license tax of five hundred dollars "on the business of selling to merchants 'trading stamps, premium stamps, or stamps or certificates of like nature or character,' and on the business of redeem-

ing such stamps or certificates in money or goods," the Court observed (69 W. Va. 125):

> "It is entirely legitimate to tax a privilege, business or occupation. Of course there must be reasonable classification, and no unjust discrimination. The tax must be equal and uniform in relation to all persons of the same class. But where a tax is imposed in compliance with these principles, no excuse for it need be sought under the police power."

And (69 W. Va. 127) further observed:

> "The tax extends to all of a class. Every person in the particular vocation must pay it. So it has been made to conform to the rule for reasonable classification, and for equality and uniformity. There is no semblance of discrimination in favor of one person engaged in the business as against another engaged in the same business. Trading stamp merchants, if such they may be called, or trading stamp dealers and redeemers, surely stand in a novel and distinct class by themselves. They do a business that is quite different from ordinary merchants. They are plainly distinguished from store-keepers who sell for cash or credit and deal in goods after the ordinary methods."

On page 128 it was further observed:

> "The rule for reasonable classification has been fulfilled by the act fixing the tax in question. 'The power of the state to distinguish, select and classify objects of taxation has a wide range of discretion. Classification must be reasonable, but there is no precise application of the rule of

> reasonableness, and there cannot be an exact exclusion or inclusion of persons and things.' 1 Cooley on Taxation (3rd Ed.) 76."

It was also alleged that the tax was so burdensome that it prevented the Sperry & Hutchinson Company from making any profit on the business which it conducted in the City of Charleston. The Court concluded (69 W. Va. 128):

> "The Legislature had the power to select and justly tax the trading stamp business; and the presumption that it has placed a reasonable tax thereon has not been overthrown. The tax, as far as appears in this case, does not contravene any provision of the State Constitution or the Fourteenth Amendment to the Federal Constitution."

In the case of *Eureka Pipe Line Company* v. *Hallanan*, 87 W. Va. 396; 105 S. E. 506, the Supreme Court of Appeals of West Virginia had under consideration a privilege tax upon persons engaged in the transportation of crude oil or petroleum or natural gas by pipe lines. The act did not require the privilege tax from those engaged in the business of transporting oil or gas through pipe lines under ten miles in length or from those engaged in transportion other than through pipe lines, such as in tank cars by rail. The complainants contended that for this reason the act denied the equal protection of law guaranteed by the Fourteenth Amendment to the Federal Constitution (87 W. Va. 413). The Court held (Point 6 of the Syllabus):

> "The classification, for the purpose of taxation, of pipe line companies engaged in the business of transporting oil and gas into those whose

> systems are under ten miles in length, and those whose systems are over ten miles in length, is founded upon a substantial distinction, and is not violative of that clause of the fourteenth amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws, nor of section 1 of article 10 of the Constitution of this state, the tax imposed applying alike to all in the same class."

And, in the body of the opinion (87 W. Va. 411) it was observed:

> "It is uniformly held that notwithstanding, by the constitution of a state, taxes must be levied by equal and uniform laws, and that the equal protection of the laws is guaranteed by the fourteenth amendment of the Federal Constitution, a state in the exercise of its taxing power may classify the subjects of taxation within its limits, and so long as the classifications thus made have a reasonable basis for their existence, and the tax imposed upon each member of each class is uniform, the same does not violate such constitutional limitations."

The contention was also made that the act was confiscatory. The Court held (87 W. Va. 413):

> "The contention made by the pipe line company that the act is confiscatory of its property is without merit. As we have construed the act, it does not appear that it will place any unreasonable burden upon the business in which this company is engaged, and if it should be ascertained that such is the case relief would no doubt be granted to it by proper application to the Public Service Commission for authority to increase its rates.

> The concern of the courts ordinarily is only as to the power of the legislature to impose the tax. The extent to which it may go is ordinarily a question for the legislature to determine, and so long as the tax imposed does not exceed the value of the privilege granted the courts will not ordinarily interfere to enjoin it upon the ground that it is unreasonable or confiscatory."

In the case of *Hope Natural Gas Company* v. *Hall*, 102 W. Va. 272, 135 S. E. 582, the Supreme Court of Appeals of West Virginia had under consideration the gross sales tax of West Virginia of 1925 imposing an occupation or privilege tax upon various classes of business measured by the application of varying percentages according to the classes of businesses upon the gross sales of the several businesses with a uniform exemption of $10,000 from the gross sales. The Court held (102 W. Va. 272, Point 1 of the Syllabus):

> "Chapter 1 of the Acts of the Legislature of West Virginia, passed at the Extraordinary Session, 1925, violates neither the State nor the Federal Constitution."

And, Syllabus 2:

> "Within reasonable limits the State Legislature may classify various occupations for taxation and may impose different specific taxes thereon, provided the enactment applies alike to all within each class."

The Court noted (102 W. Va. 275):

> "The plaintiff's main contentions are, that this Act purports to tax interstate commerce and

> violates Art. 1, Sec. 8 of the Federal Constitution; that the Act denied to plaintiff the equal protection of the law and violates the Fourteenth Amendment of the Federal Constitution, and that the taxes sought to be imposed by the Act are not equal and uniform, and are in violation of Art. 10, Sec. 1, of the Constitution of West Virginia."

The Court followed and quoted from the case of *Bell's Gap Rr. Co.* v. *Pennsylvania,* 134 U. S. 232, and other decisions of the Supreme Court of the United States of the same tenor, and concluded (102 W. Va. 278):

> "The foregoing decisions uphold the right of the legislature to classfy the subjects of taxation. When the right to classify is conceded, it necessarily follows that the legislature has the right to select the differences upon which the classification will be based. *Citizens Tel. Company* v. *Fuller,* (229 U. S. 322). No proof is offered that the classification of the statute is unreasonable. The statute makes no discrimination in favor of one as against another of the same class. We therefore see no repugnance in the statute to the Fourteenth Amendment."

The opinion further discussed specifically the deduction of $10,000 from the values or from the gross income taxed, and observed:

> "Statutory exemptions from taxation are generally upheld when they apply alike to all property of the same class, and are not unreasonable or arbitrary. * * * 'If the law operates upon every person within the relation or circumstances provided for, it is sufficient as to uniformity.' *McAunich* v. *Rr. Co.,* 20 Iowa 338."

The *Hope* case was appealed to the Supreme Court of the United States and affirmed, *(Hope Natural Gas Company* v. *Hall,* 274 U. S. 284) and this Court, in commenting upon the equal protection of laws, observed (page 289):

> "The claim that equal protection of the laws has been denied rests upon the assertion, first, that an unlawful tax has been imposed upon the gross proceeds from sales regardless of their place and, second, that the exemption of $10,000 from gross income by section 2h creates undue inequality. The true meaning of the statute and the thing actually taxed oppose the first assertion. We cannot say that the legislature acted either arbitrarily or unreasonably by authorizing the deduction. Nothing indicates a purpose to extend different treatment to those of the same class; no actual unreasonable inequality has been shown. Plaintiff in error is permitted to deduct $10,000; the same privilege, and nothing more, is extended to all other producers. *Lake Superior Mines Co.* v. *Lord,* 271 U. S. 577 (70 L. ed. 1093, 46 Sup. Ct. Rep. 627); *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407."

The tax considered in the case of *Sperry & Hutchinson* v. *Melton,* 69 W. Va. 124, was also considered by the Circuit Court of Appeals, 4th Circuit, in the case of *Sperry & Hutchinson Company* v. *Blue,* 202 Fed. 82. Judge Rose in writing the opinion referred to the case of *Sperry & Hutchinson Company* v. *Melton,* 69 W. Va. 124, and (202 Fed. 85) set forth the figures presented in both cases by the Sperry & Hutchinson Company in asserting that the tax was confiscatory of its business:

> "The Supreme Court of Appeals understood the bill before it as alleging that the Stamp Com-

pany if it was required to pay the tax could not carry on its business in Charleston, Kanawha County, at a profit. What that bill said was that the Stamp Company's total receipts from its business in that county was or would be $7,500. If it paid the tax, its expenditures would be $7,665. With the bill in the pending case were filed certain exhibits. From them it appears that in a period of a little over three years the Stamp Company's receipts in Charleston aggregated $19,800.54, its expenditures $21,291.40. Of these expenditures $1,500 were on account of the tax now assailed, and an additional $1,000 on account of the municipal tax levied by an ordinance of the city of Charleston. These figures do not differ widely enough from those before the state court to justify us in assuming that had they been before that court its conclusion would have been different from that at which it in fact arrived. The figures in the exhibits when analyzed do not show that the tax is prohibitory. During the part of the calendar year 1908 in which it was carrying on business in Charleston, and during the whole year of 1909, its receipts footed up $8,064.97. Its expenditures, exclusive of either the state or municipal license tax, were $8,913.64. That is to say, if it had paid no such tax, it would still have lost $848.67. In 1911 its receipts were $5,481.65. Its expenditures, other than those for license taxes, $3,881.95. That is to say, but for the tax it would have made a profit of $1,599.70. The state tax which is here assailed is $500 per year. The municipal tax is of a like amount. The Stamp Company could during the year 1911 have paid both of these taxes, and still have cleared $599.70, which is about 10 per cent. of its gross receipts. So far as these figures show anything, they strongly suggest that in the first months and years of the business in a particular locality money is lost.

> This is not a phenomenon peculiar to trading stamp companies. After the business has once been well established, it becomes profitable. Possibly it may become so profitable that it will be able to pay the license tax or taxes and still make money."

The Court further noted the observation made in the decision of the Supreme Court of Appeals of West Virginia (69 W. Va. 124):

> "The Supreme Court of Appeals, in the course of its opinion, said that the Stamp Company did not say that other persons might not be able to carry on the business at a profit. It merely alleged that it could not. In the present bill the Stamp Company says that other trading stamp concerns had tried to pay the tax and do business in West Virginia, and that they had, one and all, given it up as unprofitable. It asserts that none could succeed where it failed, and that it would be successful when many or most others would go to the wall. It explains that it feels justified in so stating because it has had a wider experience and has abler management and larger capital than any other person or corporation in the same business." (202 Fed. 86).

However, the Circuit Court of Appeals (202 Fed. 88) inquired:

> "Has this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is so large that it could not reasonably have been intended to produce revenue?"

and reveiwed at length a number of cases which we have cited in this brief to the effect that the responsibility of

the legislature for the imposition of a tax alleged to be oppressive is to the people and not to the courts, including *Kehrer* v. *Stewart,* 197 U. S. 60; *Postal Telegraph Company* v. *Charleston,* 153 U. S. 699; *McCray Refrigerator Co.* v. *United States,* 195 U. S. 27; *Austin* v. *Aldermen,* 7 Wall., 694, and concluded:

> "The Constitution of the United States effectively prevents many forms of injustice, even when perpetrated under the guise of legislative acts. It does not prevent all of them. It cannot, without substituting the judicial for the legislative judgment and discretion in some matters in which the public weal requires that the legislative, rather than the judicial, decision shall be conclusive." (202 Fed. 89).

It is believed that Judge Rose's opinion for the Circuit Court of Appeals is very pertinent here inasmuch as the opinion was expressed in connection with the consideration of a statute of West Virginia which had also been considered by the Supreme Court of Appeals of West Virginia, both courts arriving at the same conclusion, and the questions of classification and alleged confiscation under the Constitution of West Virginia as well as the Constitution of the United States being involved.

From the decisions above referred to it would seem that under the provisions of the West Virginia Constitution prior to the recent amendment, in so far as the application of the due-process and equality-and-uniformity provisions of the West Virginia Constitution to taxing statutes are concerned, the interpretation of the Supreme Court of Appeals of West Virginia has been in entire accord with the interpretation of the Supreme Court of the United States of the corresponding provisions of the Federal Constitution, the Supreme Court of Appeals of West Virginia having repeatedly followed and

quoted from decisions of the Supreme Court of the United States; and that, with respect to classification, the Constitution of West Virginia is not violated so long as all persons similarly circumstanced are treated alike, and with liberal regard for the legislative right to make the classification and determine the rate of imposition.

With respect to the rate of the tax under the Constitution of the State of West Virginia, the observation in the case of *Sperry & Hutchinson* v. *Melton,* 69 W. Va. 124, 127, is particularly apt:

> "The amount of the tax, judged in connection with what we may personally think about the opportunities and results in the trading stamp business, cannot properly be raised for decision. * * *"

Also the observation in the case of *Eureka Pipe Line Company* v. *Hallanan,* 87 W. Va. 396, 413:

> "The concern of the courts ordinarily is only as to the power of the legislature to impose the tax. The extent to which it may go is ordinarily a question for the legislature to determine, and so long as the tax imposed does not exceed the value of the privilege granted the courts will not ordinarily interfere to enjoin it upon the ground that it is unreasonable or confiscatory."

There is no decision of the Supreme Court of Appeals of West Virginia invalidating any tax statute because of alleged oppression. Just as with respect to the Fourteenth Amendment the Supreme Court of the United States holds that the rate of taxation is a legislative matter, for which, in case of abuse, the legislature is

responsible to the people and not to the courts, so with apparent uniformity in interpreting the state statutes, the state courts hold that it is not their province to determine the reasonableness or unreasonableness of the rate of a tax where the power to tax exists, in the absence of express constitutional limitation.

See *Interstate Company* v. *Richardson,* 177 Ga. 9, 12; 169 S. E. 373, 374, wherein an occupational license tax of $500.00 on vendors of merchandise operating on trains was held not discriminatory, confiscatory or violative of constitutional provisions guaranteeing protection of property, due process, and equal protection, notwithstanding none of such vendors in the state were earning sufficient profits to pay the tax, and *Fleischmann Co.* v. *Conway,* 168 La. 547, 122 So. 845, wherein a tax of ten cents per pound upon the sale of malt extract was sustained as a license tax though the evidence showed that the malt extract could not be sold without loss with such tax imposed.

In the case of *Erwin* v. *City of Omaha,* 118 Neb. 331, 224 N. W. 692, an occupational tax of $15.00 per day upon operators of rolling stores was sustained.

There are a few cases of state courts striking down municipal ordinances because the taxes thereunder have been considered too burdensome, but the courts are careful to note that for obvious reasons, among them that in the absence of express constitutional limitation the legislature has inherent power to tax, while the city council has only such power as has been delegated by the legislature, the principles applicable to the consideration of revenue ordinances enacted by a city council are quite different from those applicable to a revenue measure enacted by a state legislature.

In *Interstate Company* v. *Richardson,* 177 Ga. 9, 13, 169 S. E. 373, 375, it was observed:

> "The cases of *Postal Telegraph-Cable Co.* v. *City of Cordele,* 141 Ga. 658-664, 82 S. E. 26, *Atlantic Postal Telegraph-Cable Co.* v. *Savannah,* 133 Ga. 66, 65 S. E. 184, *Morton* v. *Macon,* 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485, and a number of similar cases cited by diligent counsel for the plaintiff, related to municipal ordinances imposing license taxes. It must be borne in mind that the tax which we are now considering was not the result of a municipal ordinance, but of an act of the state Legislature, and the law recognizes a marked difference between the two."

See also: *A. Magnano Co.* v. *Dunbar,* 2 Fed. Supp. 417, 421-2, wherein it is observed:

> "The reasonableness of the revenue act is not open to judicial review unless the organic law is violated, but the reasonableness of a municipal ordinance, except where it conforms strictly to express and specific legislative grant, is more amenable to judicial review and determination. *Roach* v. *Ephren,* 82 Fla. 523, 90 So. 609; *State* v. *Wilson,* 101 Kan. 789, 168 P. 679, L. R. A. 1918B, 374."

The Supreme Court of Appeals of West Virginia recently considered a case in which it was contended that since the adoption of the amendment, to Section 1, Article X of the Constitution of West Virginia, *supra,* occupation and privilege taxes might no longer be classified. *Laing* v. *Fox,* West Virginia, 1934, not yet reported. This case involved the contention that the occupational tax there involved, if an occupational tax,

violated the amended section because it exempted the occupations of horticulture, agriculture and grazing, and, if an income tax, could be classified or graduated only as to amount and not as to source. The act under consideration was a part of the gross sales tax considered in the *Hope Natural Gas Company* v. *Hall,* 274 U. S. 284, amended. It was also charged that the tax violated the provisions of the Fourteenth Amendment to the Federal Constitution and denied the plaintiff the equal protection of the laws and deprived him of property without due process of law. The Supreme Court of Appeals of West Virginia considered at length the decisions of the Supreme Court of the United States and quoted with approval from the opinion of Chief Justice Hughes in the case of *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, in disposing of the contention that the tax in question was violative of the provisions of the Fourteenth Amendment to the Federal Constitution and, in commenting upon the contention that the act violated the tax amendment to the Constitution of West Virginia, observed:

> "Does the exemption violate the tax amendment to the Constitution wherein it provides that 'the legislature shall have authority to tax privileges, franchises and incomes of persons and corporations and to classify and graduate tax on all incomes according to the amount thereof, and to exempt from taxation incomes below a minimum to be fixed from time to time?' It is urged by counsel for plaintiff that as the amendment confers upon the Legislature authority only to classify and graduate tax on incomes, it is without power to classify privileges and franchises. A sufficient answer to this contention is that the Legislature is inherently vested with plenary powers in the absence of explicit constitutional

> inhibition. 'Whether the Legislature has a certain power (not directly withdrawn) is not to be decided simply by marshalling the reasons for and against and then determining on which side is the weight of argument. The negation of the power must be manifest beyond reasonable doubt.' *State Road Commission* v. *County Court of Kanawha County,* 112 W. Va. 98." (175 S. E. 354, 359).

Thus the Supreme Court of Appeals of West Virginia has indicated its interpretation that the recent amendment to Section 1, Article X of the Constitution of West Virginia has not changed the previous provisions of the Constitution of West Virginia with respect to due process of law or equality and uniformity in connection with the classification of the subject matters of taxation as previously declared in the cases of *Eureka Pipe Line Company* v. *Hallanan, Sperry & Hutchinson* v. *Melton,* and *Hope Natural Gas Company* v. *Hall, supra.*

It would, therefore, seem to be clear that the act in the case at bar is not violative of any provisions of the Constitution of West Virginia.

Double Taxation

In the lower court appellee insisted that since it is required to pay the gasoline gallonage tax and the license taxes included therein, being $1.00 for each filling station and $5.00 for each bulk plant (Section 2, R. 106-7) the collection of the general store tax under the act here in question would constitute unconstitutional double taxation.

The gallonage tax is an excise paid by the consumer, and the so-called license taxes imposed under the gasoline tax statute are no more than mere registration fees

of the dealers in gasoline for the more effective administration of the act in collecting the gallonage taxes. The gasoline tax relates to the sale of the single commodity, gasoline. The store tax is a tax on the operation of a store, regardless of the kind, or of how many kinds, of merchandise may be there sold. In West Virginia, as in most of the states, there have been various specific taxes upon the sale of particular commodities, for instance, tobaccos and drugs. It would hardly be suggested that the payment of such specific taxes would preclude the imposition of a general tax on the operation of a store in which such commodities are sold.

Under the subject "Two or more license taxes or fees —General rule," in Cooley on Taxation (4th ed.), Vol. I, Section 233, page 495, it is said:

> "A person engaged in several distinct occupations or businesses in the same city or town may be required to pay a license tax for each, but power to tax a business does not include power to levy a tax upon the particular elements or operations which go to make up the business. So it is no objection to a license that it imposes a fee for regulation and also a fee for revenue, either as one fee or two. A second license tax is not invalid as double taxation, since the tax may be decreased or increased. A fortiori, license fees, where not for the same thing, do not constitute double taxation. So it is competent to tax brokers upon their annual receipts, notwithstanding they pay a license tax for the privilege of carrying on that business. A corporation may be required to pay a special exicse tax in addition to a license tax without being subjected to double taxation. A tax on ice houses or agencies of a certain sum where not more than five wagons are

> used for selling or delivery purposes, with an additional tax of ten dollars for each additional wagon, is not double taxation."

The second observation that "power to tax a business does not include power to levy a tax upon the particular elements or operations which go to make up the business" does not seem to be fully supported by the cases cited in support thereof. The cases referred to, with the exception of the Tennessee case of *Shelton* v. *Silverfield,* 104 Tenn. 67; 56 S. W. 1023, involve tax ordinances enacted by municipal corporations rather than the enactments of state legislatures. In that connection it seems that the rules of the courts of Kentucky and Tennessee (compare *City of Newport* v. *Fitzer,* 131 Ky. 554; 115 S. W. 742; and *Gulf Refining Company* v. *Chattanooga,* 136 Tenn. 305; 190 S. W. 623) are a more strict interpretation against the existence of more than one tax touching the same subject matter than is the rule of more general application throughout the other states.

In discussing so-called double taxation the inquiry is, in reality, not one of legislative power but of legislative intent. No constitutional questions, other than indirectly the equal protection of the laws, are involved.

In the case of *Shaffer* v. *Carter,* 252 U. S. 37, 58, it was said:

> "Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the 14th Amendment prevents the states from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. *St. Louis*

Southwestern R. Co. v. *Arkansas,* 235 U. S. 350, 367, 368."

And, in the case of *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 72, it was said:

> "The objection that the appellants should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause. See *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413; *St. Louis, Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 367, 368; *Shaffer* v. *Carter,* 252 U. S. 37, 58; *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 533."

So far as legislative intent is concerned, where that intent is clear, the majority of the courts do not hesitate to sustain the several taxes even though they may, in instances, be double or multiple. See *Equitable Life Assurance Society* v. *Hart,* 55 Mont. 76, 173 Pac. 1062, wherein it was held that a license to carry on a particular business, to be secured and the fees to be paid before commencing the business, and a license fee of one per cent on the net income of every corporation engaged in the business, did not constitute double taxation.

In *Provo City* v. *Provo Meat and Packing Company,* 49 Utah 528, 165 Pac. 477, an occupation tax was imposed on merchants, based on the stock of merchandise, which was divided into twenty-two classes ranging from $200, the lowest, to over $500,000, the tax ranging from $10.00 to $200.00. Another tax was imposed on selling fresh

meats, ranging from $15.00 to $35.00. The court held, point 5 of the syllabus:

> "Under Comp. Laws 1907, sec. 206, as to regulation and taxation of merchants, it is within the power of a city to impose a general merchant's license tax upon one who is engaged in a general merchandising business, including the sale of meats, and further to impose a license tax upon his business of selling meat."

The case of *Viquesney* v. *Kansas City,* 305 Mo. 488, 266 S. W. 700, is a striking example of the imposition of multiple taxes without violating the rule of double taxation. There the defendant paid a tax of $15.00 per year on his garage under the terms of an ordinance providing for the restriction and licensing of various occupations. He paid also a tax of $10.00 on his gasoline curb. He paid an ad valorem tax of $1.77 on his property. He challenged, as constituting double taxation, the validity of another ordinance which required every person engaged in the business of selling gasoline, benzine or naptha to procure a license therefor, and to pay for the license the sum of $1.00, and thereafter one cent for each gallon of gasoline, sold. The court held:

> "The present tax being a revenue measure, it must conform to Section 3, Article X, of the Constitution, providing that the tax must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. There is nothing in the record to show that this tax offends against the requirement of uniformity, or that it is in conflict with the equal protection clause of the 14th Amendment to the Federal Constitution." *(Viquesney* v. *Kansas City,* 305 Mo. 488, 498, 266 S. W. 700, 703).

There seems to be no decision of the Supreme Court of Appeals of West Virginia discussing the supposed subject of double taxation in connection with license taxes. The case of *Harvey Coal & Coke Company* v. *Dillon,* 59 W. Va. 605, 633, involved the constitutionality of a tax upon leaseholds upon real estate separate and apart from the taxation of the real estate, in which it was asserted that the taxation of the leaseholds, inasmuch as they were but a part of the land, constituted double taxation, but this contention was rejected, the Supreme Court of Appeals of West Virginia determining that the leasehold was a separate taxable property. This case probably goes no further than to show the liberality of the Supreme Court of Appeals of West Virginia in dealing with such questions.

In the case at bar the gasoline tax and the store tax are obviously different taxes, the one upon the sale of a particular article of merchandise, the other upon the right to engage in the business of selling merchandise of any character whatever; the two taxes are for different purposes, the gasoline tax for the construction and maintenance of public highways and the store tax for the support and maintenance of schools.

The identical assertion of double taxation was made in the case of *Midwestern Petroleum Corporation* v. *State Board of Tax Commissioners,* (Ind., 1933) 187 N. E. 882, 889. The Indiana gasoline tax, in addition to the gallonage tax, required a dealer's license of $1.00 [See Burns Annotated Indiana Statutes, Watson's Revision (Bobbs-Merrill) Vol. 4, Supplement of 1929, Section 10187.1, page 684; Acts of Indiana 1929, p. 68, approved March 7, 1929] corresponding to the $1.00 license tax on filling stations and $5.00 license tax on bulk plants under the provisions of Section 2, Article

14, Chapter 11 of the Code of West Virginia imposing the West Virginia gasoline tax. The Supreme Court of Indiana observed:

> "Appellant urges that the fact that it is subject to a gasoline dealers' license tax, and is required to collect the gasoline tax upon sale of that product, and is subject to the payment of oil inspection fees, is persuasive to the proposition that it will not be included by implication in the terms of the statute, but must be excluded therefrom. But we find no necessity for an inclusion by implication, since it seems to us that it is included by express terms. The fact that its business is confined almost exclusively to dealing in petroleum products is a result of its own choice. It is well known that grocery stores, and others engaged principally in some other line of business, purvey petroleum products, and nothing but free choice prevents appellant from dealing in general merchandise in addition to the business in which it is now engaged."

Not only, so far as the store license is concerned, might appellee sell other merchandise than gasoline if it should see fit to do so, but, in fact, appellee does sell other articles of merchandise not specifically taxed, particularly, motor oils and tires, tubes, batteries and automobile accessories generally.

Governmental Policy in Taxation

Appellant in the answer (R. 97-98) says that the act in question is a tax measure, but denies that the act has nothing to do with the exercise of the police power of the state. By the police power in this connection is,

of course, meant the police power in its broadest sense in reflecting the expression of governmental policy for the general welfare of the state. The appellant avers that it is the policy of the State of West Virginia to encourage individual business enterprise rather than to encourage the citizens to be mere employees of a limited number of giant commercial enterprises. That proper governmental policy may be effected by a proper exercise of the taxing power has been recognized in many decisions. See *Fort Smith Lumber Company* v *Arkansas,* 251 U. S. 232, 234; *Quang Wing* v. *Kirkendall,* 223 U. S. 59, 63; *Alaska Fish Company* v. *Smith,* 255 U. S. 44, 48; *A. Magnano Company* v. *Hamilton,* 291 U. S. ---, 78 L. Ed. (Adv.) 712, 715; *Midwestern Petroleum Corp.* v. *State Board of Tax Commissioners,* (Ind.) 187 N. E. 882, 887-8.

CONCLUSION

In conclusion, it is respectfully submitted:

(1) That, within the meaning of the West Virginia chain store tax statute, the filling stations and bulk plants of appellee, including agency stations, are stores.

(2) That the statute rests upon a classification, the basis of which has been frequently approved by the Court, and that the rate of tax to be laid upon the basis of an approved classification presents a legislative and not a judicial question, and that the act is not violative of the Fourteenth Amendment or any other provision of the Federal Constitution.

(3) That the act does not violate any provisions of the Constitution of the State of West Virginia.

(4) That appellant properly required appellee to pay the taxes here involved. And

(5) That the judgment appealed from should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

v.

STANDARD OIL COMPANY OF NEW JERSEY, *Appellee.*

REPLY BRIEF OF APPELLANT

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STANDARD OIL COMPANY OF NEW JERSEY, *Appellee.*

REPLY BRIEF OF APPELLANT

FOREWORD

Many of the arguments advanced in appellee's brief were anticipated and met by appellant's original brief. There are, however, a number of assertions made in appellee's brief which it is believed justify the filing of this reply brief in answer thereto or in explanation thereof. This will be done rather categorically by

referring to the pages of appellee's brief on which the subject-matter is found.

ARGUMENT

The Showing of Appellee's Affiliates

The statements found on pages 4 and 6 of appellee's brief might carry the suggestion that appellee gave, and the record shows, the activities of appellee's affiliates, except those operating in other parts of the world. Such is not the case. Doubtless many of the foreign activities of appellee's affiliates would be unrelated to appellee's West Virginia business. Appellee declined to give the information which would have enabled the court to determine the relevancy of the information requested of appellee by appellant. But this is not all, appellee refused to show pertinent facts relating to companies admittedly related to appellee's West Virginia business, and refused to give full information concerning the production and transportation of even the very crude petroleum which was used in the West Virginia business. It is appellant's position that appellee, if it would show confiscation, was, in view of the allegations of the answer and amended answer, required to make a full showing. This full showing it refused to make, not because the questions or inquiries were too broad, but because appellee insisted that other information was irrelevant, even though it be concerning the production or transportation of the very crude oil which was refined and distributed in West Virginia, because not related to the *marketing business* in West Virginia. See discussion in appellant's original brief, pages 38 to 46, inclusive, wherein in many particulars it is pointed out that most pertinent information was not disclosed by appellee.

Independent Dealer Stations

In appellee's brief, pages 7 and 18, it is stated that the organization of appellee's system of stations does not interfere with or tend to eliminate the business of single station operators, and references are made to the respective opinions of Judges Soper and Chesnut (R. 259, 267). It is obvious that this conclusion is unfounded. In the same opinion (R. 271) Judge Soper observed: "The possible volume of business for most of the stations is necessarily limited in amount." Can it be said that when the business is limited in amount the operation of 1003 Standard stations, or 2453 chain stations in all, as against 2000 independent stations, does not interfere with or tend to limit the operation of the individual stations? Still further (R. 49), 848 of appellee's stations are agency stations, meaning stations constructed and owned by other persons and thereafter leased by appellees, with the owner usually employed as the agent of appellee to operate same. Of necessity every such lease and agency is in itself the displacement of an individual dealer.

Closely related to this observation is the further observation made by the district court (R. 266-8) to the effect that the usual objections to other types of chain stores may not be raised against the filling station chains, for the reason that the filling stations are as much a pioneer of the new development in the automobile and petroleum industry as is the single station operator. The record does not sustain this observation. To the contrary, the record shows that the major gasoline companies launched into the extensive chain operation of filling stations only recently. The first agency station of appellee was not taken until January, 1930, (R. 169) after which appellee rapidly increased its agency stations, at one time to in excess of 848 stations, but to that number

at the time of the enactment of the tax statute herein involved, although appellee had operated a few company owned stations since 1922, but prior to 1927 less than fifty in number (R. 150). The other major companies inaugurated the agency station system at or about the same time, that is to say, 1930 (R. 197). And Judge Soper, in his opinion (R. 259), says that the establishment of such stations by oil companies of national scope "is a matter of comparatively recent date." It is a matter of common and general knowledge that the distribution of motor fuels and lubricants had been highly developed and had become very extensive prior to the year 1930, or even 1927.

Diminishing Returns

On page 18 of its brief appellee refers to the observation of Judge Soper (R. 254-5), that a large number of new stations "in excess say of 150 stations, has been accompanied by diminishing rather than increasing returns." It will be noted that Judge Soper's observation is made from the figures, appearing in the record, derived from the gallonage taxes collected in the State of West Virginia from 1927 to 1932, regardless of the character of the stations at which the gasoline was sold. These figures can suggest only one of two things, namely, that less gasoline has been consumed in recent years in West Virginia, or that the Standard company has sold a smaller percentage of the gasoline consumed in West Virginia. The figures on the gallonage tax would be identically the same, if the same amount of gasoline were sold, whether the same be sold through Standard stations or through individual dealers. The gasoline gallonage tax is not measured by what Standard sells at its own stations or agency stations, but by the whole gallonage sold by it in the state. If Standard did not

have a single filling station in the state, and more Standard gasoline were consumed in the state, the gallonage tax would thereby be increased. The record shows (R. 204) that the percentage which the consumption of Standard gasoline bears to the consumption of all gasoline in the State of West Virginia has steadily decreased since 1929, as well as the gallonage consumption. On the other hand, the record (R. 216) showing gross sales taxes, wholesale and retail, of the Gulf company shows that its volume of business has increased. Perhaps the diminishing returns of the Standard company are occasioned by the increased activity and business of the Gulf and other gasoline companies. Perhaps, also, were it not for the fact that the Standard company in recent years has had so many company and agency stations scattered throughout the State of West Virginia, its returns may have diminished even more, and the percentage of Standard gasoline consumed in West Virginia, as compared with the consumption of all brands consumed in West Virginia, might have been even more reduced.

From what information the learned judge concluded that the point of diminishing returns was reached in the one hundred and fiftieth station we are unable to ascertain. Certainly, there is nothing in the record to justify this figure. If that point be accepted as the point of diminishing returns, and the point of diminishing returns be determinative of this case, then the act in question would be valid as to Ashland Refining Company, which had only 95 stations (R. 143), and as to Sinclair Refining Company, which had only 94 stations (R. 143), even though each of said companies comes within the highest bracket of 75 stores or more, and would have been invalid as to appellee and the Gulf Refining Company, while, as a matter of fact, the opinion

of the learned judge held the act unconstitutional as applied to all filling stations.

Open Stock Goods

At page 18 of its brief appellee refers to the fact that independent dealers sell appellee's products. Of course, such independent dealers purchase said products from appellee and pay for the same at appellee's posted retail price less a stated discount, with respect to gasoline, ordinarily three cents below said posted price (R. 173), regardless of fluctuations in such price. That individual dealers may handle the same "open stock" goods which are handled by the chain stores does not place the chain stores and the individual stores in the same classification. This contention was presented without avail in the case of *Great A. & P. Tea Co.* v. *Maxwell,* the North Carolina case. (See record in *Great A. & P. Co.* v. *Maxwell,* page 60, and Appellant's brief therein, page 6).

Fixing of Retail Prices

In appellant's original brief (pages 42-3) it is shown that the distributors of gasoline in general maintain the same retail prices. Appellee in its brief (page 66) would contend that there is no concert of action between the distributors, and particularly refers to the fact that while the Gulf and Sinclair stipulations stated that those companies, singly or with others, posted prices, and it is further shown that the prices are uniform, the names of the others with whom said companies post prices is not given, and suggests that the others may have been mere affiliates of Gulf and Sinclair, respectively. The Ashland stipulation shows that the posted retail prices are designated by the larger companies (R. 295-6). There can be no mistake about which are the larger

companies in the State of West Virginia, and the record shows that Standard and Gulf are the two largest among them. Whether the companies act in concert or not, there is certainly sufficient showing in the record to sustain the conclusion that there is no competition as to price, however great the competition as to location of stations and other distributing factors may be.

Passing the Tax On

The appellee complains particularly (brief, page 38) that the taxes under the act in question may not be passed on by the gasoline companies to the consumer. It is not believed that the validity of the tax is dependent upon the ability of those upon whom it is imposed to pass it on to others. And yet, the statement that this tax may not be passed on is open to question. Certainly, under the conditions shown by the record to be existing, the tax can largely be passed on. The record shows beyond question that the retail price of the same grades of motor fuels of the various companies in the same localities are uniform. The record also shows that the sale of gasoline by the distributors to individual station operators is made on the basis of that uniform posted retail price, less certain specified discounts. If the posted price be fifteen cents, by way of illustration, and the discount three cents, then the distributor actually receives twelve cents. If that price be increased to seventeen cents the individual dealer receives no more, but the entire two cents increase goes to the distributor. The individual dealer's profits are not increased a fraction of a cent, but the gross receipts of the distributors are increased. The record shows that thus far there has been no cut-throat competition between gasoline distributors in the matter of prices, and if the gasoline distributors thus far have been able to main-

tain even prices the record shows no facts which would prevent their maintaining such even prices on a slightly higher level. The record also shows that prior to the enactment of the tax the business of appellee with respect to profits was somewhat more favorable than the other principal distributors, who had losses where appellee had small admitted profits (R. pages 215-224). Undoubtedly, these distributors whose experiences heretofore have been less favorable will be very willing to convert such minor differences as might exist between their store taxes and appellee's store taxes into reduced losses, or increased profits, rather than to attempt to utilize such small differences to enforce losses upon appellee, and increasing losses upon themselves. It has already been shown in appellant's original brief (p. 46) that if appellee did not discriminate in favor of its agents to the extent of one-half cent per gallon, as compared with the individual dealers, this difference would go a long way toward absorbing the tax.

On pages 76-77 of appellee's brief it is stated that the average store tax on all operators of more than one service station is three per cent of the gross revenue. Appellee contends that its store tax is 4.2 per cent of its gross revenue, and bases that percentage upon the figures given in the findings of fact by the trial court (R. 278), fixing the gross revenues of appellee at all gasoline stations at $6,428,701.00. It will be noted, however, that the table there referred to was calculated with the bulk plants excluded. The true gross revenues of appellee for 1932, less the gallonage tax, was $8,381,195.48, being the gross revenue shown by appellee, including bulk sales (R. 9), less the gallonage tax of $1,817,257.84. (See computation, Appellant's original brief, page 36). Appellee's percentage is thus 2.87 or slightly less than the average store tax on chain filling

stations shown by appellee. Certainly, appellee cannot complain of this slight variation of its percentage, which is less than the average percentage, and which is in its favor, under the rule of rough and ready application, which appellee apparently recognizes in its brief (page 81).

Stores

Appellee admits (Brief, pages 88-101), that gasoline and motor oil are merchandise. While appellee does not expressly admit the same to be *ordinary* merchandise, in attempting to reply to the showing of appellant's brief (pages 53-66), appellee does not undertake to show that what it admits to be merchandise is not ordinary merchandise. We therefore again urge that if it be admitted, and it cannot be denied, that gasoline and motor oils are merchandise, of necessity filling stations are embraced within the definition of "store" in the West Virginia Chain Store Act, Section 8 (R. 40).

At pages 111-12 of its brief appellee quotes from the opinion of the district court the illustration that hotels do not become stores merely because they may sell cigars or flowers, or perhaps other articles. We do not concede that if a hotel departs from the furnishing of lodging and meals, in principle and in reality hotel purposes, and actually within the hotel conducts a store for the sale of cigars and tobaccos, cosmetics, flowers, or any other articles of merchandise, it may not be required to pay the usual store tax. It is a matter of common knowledge that the hotels in selling tobaccos are required to pay the special tobacco taxes, and in selling liquors, pay the liquor taxes, and if in fact they operate stores, we know of no principle of law which exempts them from the store tax.

The Tax Commissioner's Construction

The West Virginia Chain Store Act vests its administration in the State Tax Commissioner (R. 38). The record shows that the construction placed upon the chain store act by the State Tax Commissioner was that it applied to filling stations and bulk plants (R. 46), and, in fact, the bill of complaint so avers (R. 4). If there be any doubt as to the proper construction of said act as including bulk plants and filling stations within the provisions of the act, the construction and interpretation of the Tax Commissioner should receive consideration.

> "Where a statute is of doubtful meaning the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous."
>
> *Brandon* v. *Board of Control,* 84 W. Va. 417 (Point 2, Syl.).

The rule is stated in Cooley's Constitutional Limitations, 8th Ed., Vol. 1, p. 147, as follows:

> "Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind."

See also *Daniel* v. *Simms,* 49 W. Va. 554, Point 6 of Syllabus, and *Richmond* v. *Drewery-Hughes Company,* 122 Va. 178, 193; 94 S. E. 989, 992.

Appellee's Entire Argument May Be Resolved Into an Objection to the Rates of the Tax in Question

Appellee's brief throughout, in discussing the alleged constitutional questions of equal protection of the laws and due process of law, may be resolved into the single question of the rate of the tax on its chain of bulk plants and filling stations.

Appellee (Brief, 24) admits that its system is a chain. Appellee refers to several references in the opinions of the district court to the effect that the tax here in question rests only on the number of stores in the chain (Appellee's Brief, pages 20, 21, 56) and observes (Appellee's Brief, page 80): "In determining the validity of a classified tax, the ground work of facts is controlling. This is a practical rule, indicating that a tax classification must bear some reasonable relation to some *taxable quality,* and it is the direct antithesis of the statement in the answer that to justify the tax the court need look no further, once it determines that the taxpayer is taking advantage of the opportunity of engaging in the 'store business'." (Italics ours).

When appellee refers to the classification in the act in question as being based solely, or only, on the number of stores in the chain as a basis of classification, appellee overlooks—as did the lower court—the fact that this Court, the Supreme Court of the United States, has held in the *Jackson* and *Liggett* cases, as well as in the *Great A. & P.* v. *Morrissett* and the *Great A. & P.* v. *Maxwell* cases, that the chain method of merchandising is, in itself, a taxable quality, so that we have here presented, not the single taxable quality of numbers, but the taxable

quality of numbers, the taxable quality of the chain method of business, and the taxable quality of the utilization here by appellee of all of the factors considered in the *Jackson* case, or their reasonable equivalents, in distinguishing the chain method of merchandising from the methods of individual merchants. (See comparison of advantages discussed in the *Jackson* case with advantages with the case at hand in appellant's original brief, pp. 29 to 32, inclusive.)

In appellee's "Summary of Argument," brief, page 11, clause B-2, appellee charges arbitrary and discriminatory *rates* of taxation without rational relationship to the value of the privilege subjected to the tax. In appellee's brief, pages 15 and 16, appellee attempts to distinguish the case at bar from the *Jackson, Liggett,* and other chain store cases by the fact that the maximum rate in the *Jackson* case was $25, while in the case at bar it is $250. In the outline of points relied upon by appellant, (Brief, page 23) appellee contends that "The company asserts that an academic discussion of classification without consideration of the rates and the graduation of the rates is an argument in *vacuo.*" And, on page 24 appellee states, in reply to the contention of appellant that appellee has not shown the tax to be confiscatory, "The ready answer to this is that confiscation is not an essential element of discrimination, but, answering the argument factually, the record does show that the tax attempted to be imposed confiscates the entire earnings of appellee's stations, and as to the other oil companies paying the highest rate, the tax is a capital levy." Thus appellee apparently takes a change of position on confiscation and attempts to convert confiscation into discrimination and then resolves the question of discrimination into one of classification. Obviously, the act in question operates equally and

uniformly as to all persons similarly circumstanced, as was pointed out in the *Jackson* case.

Again appellee (Brief, page 37) complains that the tax is a prohibitive exaction upon the five distributing companies falling within the highest bracket of the tax.

Appellee (Brief, page 8) points out that individual dealers paying a tax of $2.50 may do a larger volume of business than some of appellee's stations paying an average of $240, and (pages 72 and 73) sets forth various competitive stations doing approximately the same amount of business in which some stations pay only $2.50 while appellee pays $239.45; and shows certain other company stations selling slightly more than seventy thousand gallons of motor fuel per year with profits averaging $380 each, compared with Fort Defiance Service Station selling approximately the same amount of gasoline with net profits of $881.57, but does not show why, from the sale of the same quantity of gasoline, the Fort Defiance Station is enabled to make more than double the average profit shown by appellee for its own stations. The suggestions of these comparisons were fully answered in the *Jackson* case in which the plaintiff there paid taxes of $5,443.00 and had gross sales of approximately $1,000,000.00 while two department stores in Indianapolis paid $3.00 each and had gross sales amounting to approximately $8,000,000.00 each. Such questions have been put at rest by the decisions in the *Jackson* and *Liggett* cases.

Again, appellee (Brief, pages 60, 68, 69) complains that the graduation of rates of the tax in question is not sufficiently moderate, as though to suggest that if there were a lesser increase than $100 in going from the fiftieth to the seventy-fifth store, and less than $50 in going from the seventy-fifth store to all additional stores, the tax might be unobjectionable.

In comparison with the basis of graduation involved in the case at bar—which it is submitted is a legislative question—for purposes of illustration, the plan of progression followed in the South Carolina chain store statute (*Southern Grocery Stores* v. *South Carolina Tax Commission,* 55 Fed. (2d) 931) may be considered. There, instead of grouping various classes of stores according to numbers, the South Carolina legislature added $5 to the tax for each store, that is $5 on the first store and $5 additional for each additional store until the tax for the thirtieth store was $150; and, not increasing so rapidly as in the South Carolina case, let us suppose in the case at bar the tax for one store was $1, for the second store, $2, for the third store, $3, and so on until the one-thousandth store became $1,000, could it be said that the progression was not sufficiently moderate? Nevertheless, on that basis appellee, instead of paying $240,173.50 would have paid approximately $480,000. Reduce the scale still further and put a tax of 50¢ on the first store, $1 on the second store, $1.50 on the third store, and so on until the thousandth store is reached and appellee would still pay substantially the same figure as that required by the act here under consideration. Could it then be considered that the graduation was too sharp? This Honorable Court has held in the case of *Liggett* v. *Lee,* 288 U. S. 517, at page 533:

> "The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary."

Very plainly, all questions urged by appellee in its brief have been determined adversely to appellee by previous decisions of this Court in chain store cases. The only difference is that the tax here is a little higher

than the taxes considered in other cases. If the tax here were measured in dimes rather than in dollars, probably appellee would never have thought to complain or to question the constitutionality of the act. Wherefore, the observation of this Court in the case of *A. Magnano Company* v. *Hamilton, Attorney General,* 291 U. S. ---; 78 L. Ed. (Adv.) 712, 716, is exceedingly pertinent, wherein it was said:

> "If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act."

The Opinions of the Court Below

Appellee in its brief has repeatedly and at length quoted from the opinions of the district court. It is for the purpose of preventing that decision from becoming a precedent that appellant has respectfully and with deference to that court, sought this appeal. So far as the opinions of the lower court relate to the constitutional questions of equal protection and due process, it is believed that they utterly disregard the decisions of this Court in the previous chain store cases. So far as one of the opinions relates to the question of whether filling stations are stores within the meaning of the West

Virginia chain store statute, while the opinion presents in a very interesting manner (R. 271) various considerations which might well influence legislative policy, and which probably the West Virginia Legislature fully considered, it contains no reasoning or reference to precedent which is very persuasive that the legislature in this instance did not intend to and did not, in fact, include filling stations within the definition of "store" adopted by the legislature.

Questions Under the State Constitution

Inasmuch as in the court below appellee insisted that the act was violative of the equality-and-uniformity provision and the due-process provision of the West Virginia Constitution irrespective of its validity under the Federal Constitution, appellant devoted a considerable part of his original brief to the showing that the same principles were applicable in determining constitutionality under the State Constitution as were applicable in determining constitutionality under the Fourteenth Amendment to the Federal Constitution. Since appellee (Brief, 137) recognizes the force of this position, appellant is quite willing that the questions of state constitutionality be governed by the determination of the supposed federal questions.

In appellant's original brief (page 82) the case of *Laing* v. *Fox* (West Virginia, 1934) was referred to as "Not yet reported." The case is now reported in 175 S. E. (Adv.) 354, and was so noted in the index in the original brief.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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October 12, 1934.

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CHARLES ELMORE CRO

Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Appellant,

v.

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

Appellee.

BRIEF OF APPELLEE

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Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Appellant,

v.

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

Appellee.

BRIEF OF APPELLEE

I. Jurisdiction.

The question of equity jurisdiction is not raised in this Court. The jurisdictional propositions made by appellant here are:

(1) That the suit is prosecuted against the State of West Virginia in violation of the Eleventh Amendment to the Constitution of the United States, and

(2) That the constitutional questions raised are frivolous and unsubstantial, wherefore the statutory court of three judges was without jurisdiction.

The district court considered these questions in overruling the motion to dismiss.

II. Outline of the Case.

The case was submitted to the court on bill of complaint and exhibits (R. 1-67); motion of defendant to dismiss (R. 75); answer of defendant and exhibits (R. 76-118); amended bill of complaint (R. 125); amended answer (R. 126); and the stipulation of facts taken in lieu of formal evidence and exhibits (R. 139-238).

This is the first chain store tax case before this Court in which the constitutional attack is based primarily upon a factual record of gross inequalities in tax treatment. While the facts are stipulated by the parties, the court below made specific findings of those facts which it regarded as of special importance (R. 276-286). There is no dispute as to any material fact, but the parties differ as to the conclusions to be drawn therefrom.

In his brief, appellant has recited many of the facts agreed upon, but with no attempt to marshal them into significant groupings. At the risk of some repetition, therefore, attention is directed to certain facts and classes of facts, arranged so as to disclose to the Court the significance which they carry in this case.

A. WHAT THE APPLICATIONS FOR LICENSES UNDER THE STATUTE SHOW.

Applications for licenses for the year 1933 were filed by 11,348 operators of 15,210 "stores". The total tax paid by these applicants was $569,693, including the amounts

paid under protest. Of the applicants, 10,722 operated one "store" each. Of these, 2,000 were operators of service stations. Only seven taxpayers operated more than 75 "stores" and were liable for the maximum tax of $250 per "store". There were no taxpayers in the class from fifty to seventy-five "stores", and but two in the class from thirty to fifty, these being operators of service stations.

Of the seven in the highest bracket, two operated ordinary store chains, namely, the Great Atlantic & Pacific Tea Company and the Kroger Grocery & Baking Company. The other five were service station operators as follows:

	"Stores"	"Store" tax
Standard Oil Company of New Jersey	1003	$240,173.50
Gulf Refining Company	779	184,061.50
Pure Oil Company	151	26,747.50
Ashland Refining Company	95	12,719.50
Sinclair Refining Company	94	12,469.00
	2122	$476,171.00

Approximately 2,072 applicants for license were in the service station business. Seventy-two of these applicants were operators of more than one service station with a total of 2,453 stations. The total "store" tax paid on behalf of the 2,453 stations was $481,168, or 84.46% of the tax collected under the statute. The five service station operators named above paid an average tax of $224.40 per station and a total of 83.5% of all taxes paid under the statute. The appellee alone paid 42.16% of the total tax receipts. The remaining 2,067 operators of service stations paid $9,997, or 1.8% of all the taxes collected. The 67 operators of multiple service stations (other than the five named) paid an average tax of $15.09 per station.

The sales of all commodities from "stores" in 1932 totaled $328,562,161. Of this amount $20,356,638 (6.2%) represented sales from service stations. (R. 141-145.)

B. DESCRIPTION OF APPELLEE'S BUSINESS IN WEST VIRGINIA.

The tax commissioner accurately states that the company is a refiner and distributor of petroleum products, as distinguished from a producer or transporter of such products. However, he omits any description of the manner in which the business is conducted. As one of the company's contentions is that the Act has no application to service stations and bulk plants, particular attention is directed to the character of the business done at these places and the manner in which it is conducted. Service station operation, R. 152; bulk plant operation, R. 152-162; leased stations and vending privilege stations, R. 167-169.

C. EARNINGS FROM APPELLEE'S STATIONS.

A detailed analysis of the appellee's earnings is made later in this brief. We here correct certain implications of appellant's brief as to the significance of those figures.

Appellant argues that the business of the appellee is a part of a comprehensive integrated industry in which the appellee is a "mere subsidiary", that the profit and loss accounting between appellee and its affiliates is made "practically at will," and that, to determine the relation of the present tax to earnings, effect must be given to all intercorporate relations between the appellee and other subsidiaries of the parent company in this country and abroad.

This position is not tenable. The tax is imposed upon the marketing units and an inquiry into the earnings of the producing and transporting companies is shown to be irrelevant. The record shows the prices at which petroleum products of the company are billed from the refinery to the marketing department. They approximate closely the current refinery billing price in the area (R. 177; Graph, R. 206). The reasonableness of the billing prices is amply supported by the following record:

First: Loss of the affiliated producing company which supplies crude oil to the Parkersburg refinery. (R. 208-209).

Second: Profit statement of two affiliated pipe line companies transporting petroleum to Parkersburg refinery. (R. 209.)

Third: Estimated statement of profits of affiliated company which supplied tires to West Virginia service stations. (R. 209.)

It is the specific finding of the court below (R. 284) that the stipulated facts make it possible to decide whether the figures taken from appellee's books, and shown in the stipulation, correctly state the actual profits or losses of the business done at its stations in West Virginia, and the court concludes:

> "We conclude from these stipulations that the figures, relating to the profits and losses of the gasoline and oil stations of the company, may be relied on as truly representing the results of the company's marketing transactions in the state." (R. 285.)

The stipulation (R. 211) includes a letter from counsel for the appellant asking for separate profit and loss statements from all the affiliated and subsidiary companies of the "Standard Oil Group" for the years 1930-1933, also a letter from the chief counsel of the appellee (R. 212) declining to give profit and loss statements of the affiliated companies operating in other parts of the world on the ground that such information would "add nothing of value" to the present suit.

D. BUSINESS DONE BY OTHER SERVICE STATION OPERATORS WITHIN HIGHEST TAX BRACKET.

The stipulation (R. 215-224) includes the operating statements of the Pure Oil Company, Gulf Refining Company, Ashland Refining Company and Sinclair Refining Company, so far as available for each company during the period 1931-1933. The books of these companies showed losses in the marketing branch during these years. These companies employed various methods in billing gasoline and oils from their refineries to their marketing departments, but all the statements show that if the billing prices are adjusted to the actual current price in the area (National Petroleum News quotation), the marketing losses are increased, rather than decreased. Appellant refuses to accept these operating statements (except Ashland Refining Company) on the ground that they do not reflect the operations of producing and transporting affiliates.

Appellee included the statements of these corporations to show that its earnings compare favorably with those of other operators of large numbers of service stations, thus negativing any inference that the absence of greater earnings may be attributable to inefficient or improvident management.

E. OPERATORS OF SINGLE STATIONS.

Two thousand persons operate single stations without any form of agency or license agreement or exclusive sales arrangement with distributing companies. They purchase petroleum products from appellee and other distributors.

The statute (if applicable) lays a tax of $2.50 on these individual operators and an average tax of $240.00 on the stations of the appellee. Appellee's bill of complaint (R. 22-27) and the facts stipulated at pages 173-174 of the record support the view that:

(a) The organization of appellee's system of stations does not interfere with or tend to eliminate the business of the single station operators. (SOPER, R. 259; CHESNUT, R. 267).

(b) In so far as the advantages of chain store organization inhere in the business of distributing petroleum products, appellee and similar companies share them with the single stations handling their products, and

(c) Single stations and multiple stations are operated in substantially the same way and subject to the same essential economic factors.

For these reasons appellee contends that the tax treatment accorded to it under the statute is palpably arbitrary and unrelated to any reasonable ground of difference between it and the operators of single stations.

F. GROUPS OF COMPETITIVE STATIONS.

The record (pp. 233-237) contains a brief analysis of the gross gallonage and earnings at a number of groups of service stations operated by various companies; also sales

data upon a number of the appellee's agency stations, as well as stations operated by individuals. In the original record photographs of these stations were shown.

These exhibits show (a) the relatively small business done by the typical agency station, (b) that many individual dealers paying a tax of $2.50 do a larger volume of business than stations for which the appellee is charged an average of $240, and (c) competitive groups (R. 235-237) of stations of the same general type situated in close proximity to each other, often on opposite corners. These show graphically the discriminatory effect of the "store" tax on similar stations in the same vicinity, operated by different companies under similar conditions.

G. COMMODITY STORE CHAINS.

The stipulation (R. 195-196) contains a list of large merchandising chains doing business in West Virginia, the number of stores operated by each in the state, the gross revenue therefrom, and the store tax for which they are liable under the Act. Similar figures are given in detail as to the appellee (R. 205), and generally as to all operators of service stations.

The net earnings of the appellee's stations, and of the stations of the four other companies operating more than 75 stations in the state (so far as available), are given in the record. It is shown that the relationship of the "store" tax to gross revenue in the case of multiple service stations is "in no way comparable" with the similar ratio in the case of general commodity chains. (SOPER, R. 255.)

On the basis of these data the district court noted certain significant characteristics of chain store operation and service station operation, particularly as to numbers of units and gross revenue, and concluded that the Act, when applied to both types of business, results in a gross inequality, leaving commodity store chains practically untouched, but saddling a burden on the operators of multiple service stations "out of all proportion to the value of the privilege enjoyed" by them. (SOPER, R. 260.)

III. Summary of Argument.

A. THE DISTRICT COURT PROPERLY OVERRULED THE MOTION OF APPELLANT TO DISMISS THE BILL.

1. THE SUIT IS NOT A SUIT PROSECUTED AGAINST THE STATE OF WEST VIRGINIA.

Ex parte Young, 209 U. S. 123.
Smyth v. Ames, 169 U. S. 466.
Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390.
United States v. Cordy, 58 F. (2d) 1013.

2. THE APPELLANT'S APPLICATION OF THE ACT RAISES SUBSTANTIAL QUESTIONS UNDER THE CONSTITUTION OF THE UNITED STATES.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527.
Liggett v. Lee, 288 U. S. 517.

B. THE APPLICATION OF HOUSE BILL NO. 112 TO THE APPELLEE'S SERVICE STATIONS VIOLATES THE EQUAL PROTECTION GUARANTY OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

1. THE VALIDITY OF THE APPELLANT'S APPLICATION OF THE ACT IS TO BE DETERMINED FROM ITS PRACTICAL EFFECT UPON THE BUSINESS OF OPERATING SERVICE STATIONS IN THE STATE.

Panhandle Oil Co. v. Mississippi, 277 U. S. 218.
Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389.
Wagner v. City of Covington, 251 U. S. 95.
Bandini Petroleum Co. v. Superior Court, 284 U. S. 8.
Kehrer v. Stewart, 197 U. S. 60, 69.

2. THE APPLICATION OF THE ACT TO SERVICE STATIONS IS AN IMPOSITION OF PALPABLY ARBITRARY AND DISCRIMINATORY RATES OF TAXATION WITHOUT RATIONAL RELATIONSHIP TO THE VALUE OF THE PRIVILEGE SUBJECTED TO THE TAX.

Louisville Gas Co. v. Coleman, 277 U. S. 32.
Airway Electric Appliance Co. v. Day, 266 U. S. 71.
Ohio Oil Co. v. Conway, 281 U. S. 146.
Royster Guano Co. v. Virginia, 253 U. S. 412.
Quaker City Cab Co. v. Penna., 277 U. S. 389.
South Carolina Power Co. v. Tax Commission, 52 F. (2d) 515, *aff'd*, 288 U. S. 178.
Milwaukee v. Lee, 49 F. (2d) 274, *aff'd*, 284 U. S. 590.
Fiscal Court v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296.
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79.
Liggett v. Lee, 288 U. S. 517.
Southern Grocery Stores v. Tax Commission, 55 F. (2d) 931.
Heiner v. Donnan, 285 U. S. 312, 329.

C. THE APPELLANT'S APPLICATION OF THE ACT PRODUCES A DISCRIMINATION SO ARBITRARY AND CAPRICIOUS AS TO AMOUNT TO THE CONFISCATION OF THE APPELLEE'S PROPERTY AND BUSINESS WITHOUT DUE PROCESS OF LAW.

Tyler v. United States, 281 U. S. 497.
Towne v. McElligott, 274 Fed. 960.
Brushaber v. Union Pac. Ry. Co., 240 U. S. 1, 24.
Henderson Bridge Co. v. Henderson City, 173 U. S. 592.
Nichols v. Coolidge, 274 U. S. 531.
Heiner v. Donnan, 285 U. S. 312.
Ft. Smith Lumber Co. v. Arkansas, 251 U. S. 532.

D. HOUSE BILL NO. 112 HAS NO APPLICATION TO THE SERVICE STATIONS AND BULK PLANTS OF THE APPELLEE.

Wadhams Oil Co. v. State, 210 Wis. 448, 245 N. W. 646, on rehearing, 210 Wis. 457, 246 N. W. 687.

City and County of San Francisco v. Larsen, 165 Cal. 179, 131 Pac. 366.

State v. Hanchette, 88 Kan. 864, 129 Pac. 1184.

Evening Journal Assn. v. State Board of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114.

State v. Wilson, 47 N. H. 101, 104.

LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (2d. ed.) sec. 390.

BLACK, INTERPRETATION OF LAWS (1896 ed.) pp. 198-199.

Midwestern Petroleum Corp. v. State Board, (Ind. S. Ct. dissent on rehearing) 191 N. E. 153, 154.

Fisk Rubber Co. v. Henson Auto Co., 168 Ark. 418, 270 S. W. 705.

Cesar v. Virgin, 207 Ala. 148, 92 So. 406.

Swanson v. DeVine, 49 Utah 1, 160 Pac. 872.

United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 83.

Railroad Com. v. C. B. & Q. Ry. Co., 257 U. S. 563, 589.

Kelleher v. French, 22 F. (2d) 341, 346.

State v. Harden, 62 W. Va. 313, 330, 349, 350, 58 S. E. 715.

United States v. Trans-Missouri Freight Ass'n., 166 U. S. 290, 317, 318.

State v. Lancashire Ins. Co., 66 Ark. 466, 51 S. W. 633.

Dst. of Columbia v. Washington Market Co., 3 MacArth. (D. C.) 559, *aff'd*, 108 U. S. 243.

Murdock v. City of Memphis, 20 Wall. (U. S.) 590, 618.

Gould v. Gould, 245 U. S. 151, 153.
Old Colony RR. Co. v. Com'r., 284 U. S. 552.
Alyea-Nichols Co. v. U. S., 12 F. (2d) 998.
Fry v. Ronceverte, 93 W. Va. 388, 394, 117 S. E. 140.
25 R. C. L. p. 1081.
59 C. J. p. 1131.
Gulf Refining Co. v. Chattanooga, 136 Tenn. 305, 190 S. W. 463.
Piedmont Oil Co. v. Kennedy, 165 Tenn. 375, 54 S. W. (2d) 958.
Williams v. Riley, 280 U. S. 78.
Central Transfer Co. v. Commercial Oil Co., 45 F. (2d) 400, 402.
United States v. LaFranca, 282 U. S. 568, 574.
United States v. Jin Fuey Moy, 241 U. S. 394, 401.

IV. Argument.

A. THE DISTRICT COURT PROPERLY OVERRULED THE MOTION OF APPELLANT TO DISMISS THE BILL.

1. THE SUIT IS TO ENJOIN THE PAYMENT INTO THE TREASURY OF A LICENSE TAX UNLAWFULLY COLLECTED BY THE TAX COMMISSIONER AND IS, THEREFORE, NOT A SUIT PROSECUTED AGAINST THE STATE OF WEST VIRGINIA.

It has long been settled by this Court that where the threatened action of a state officer is a violation of the personal or property rights of the complainant, the officer cannot plead immunity from suit on the ground that such a proceeding is a suit or action against the state. This is true where the statute under which the officer proposes to act is itself in violation of the Federal Constitution. *Ex parte Young*, 209 U. S. 123; *Smyth v. Ames*, 169 U. S. 466. It is equally true where the threatened act involves a wrongful administration of a constitutional statute. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390; *United States v. Cordy* (D. C. D. Md.) 58 F. (2d) 1013.

2. THE INTERPRETATION AND APPLICATION OF THE ACT BY THE TAX COMMISSIONER RAISES SUBSTANTIAL QUESTIONS UNDER THE CONSTITUTION OF THE UNITED STATES.

Appellee asked for, and insisted upon, an interlocutory injunction, grounding its complaint in part upon the unconstitutionality of the chain store statute. The relief sought, and the ground alleged therefor, required the calling together of a court of three judges. U. S. C., Title 28, sec. 380. But appellant contends that the constitutional ques-

tions are not substantial and, therefore, that an essential requisite to the jurisdiction of a court so composed is lacking.

The denial of equal protection of the laws and the violation of due process of law are the constitutional questions involved in this case. The district court held that the question of equal protection was not merely substantial but determinative.

The bill of complaint alleged the essential facts upon which this holding of the court finally rested. The flagrant and unwarranted discrimination between the operators of many service stations and the operators of a small number of stations or single stations, the arbitrary discrimination between the operators of multiple service stations and the operators of commodity store chains, and the practical singling out of the service station industry to carry the burden of the tax were all alleged in the bill and abundantly supported by the proof.

Appellant's contention is that every question here raised was previously decided in the Indiana, Florida and North Carolina chain store tax cases, notwithstanding the fact that *all five* of the distributing companies subject here to the maximum tax rate of $250 could have operated the same number of stations in *each* of the three states of Indiana, North Carolina and Florida for less license taxes than the appellee alone has been required to pay in West Virginia. This is illustrated in the following table:

TABLE NO. 1

COMPARISON OF IMPOSITIONS UNDER STATUTES APPROVED BY THIS COURT

Name of Company	No. Outlets	Indiana* (Jackson) $25 Maximum	North** Carolina (Maxwell) $50 Tax	Florida*** (Liggett) $40 Maximum	West Virginia $250 Maximum
Sinclair Refining Co.	94	$ 2,215.00	$ 4,650.00	$ 2,327.00	$ 12,469.00
Ashland Refining Co.....	95	2,240.50	4,700.00	2,367.50	12,719.50
Pure Oil Company.....	151	3,668.50	7,500.00	4,635.50	26,747.50
Gulf Refining Co.....	779	19,682.50	38,900.00	30,069.50	184,061.50
Standard Oil Co.....1003		25,394.50	50,100.00	39,141.50	240,173.50
TOTAL.....		$53,201.00	$105,850.00	$78,541.00	$476,171.00

*Acts Indiana (1929) ch. 207, p. 693.

**Public Laws, North Carolina (1929) ch. 345, sec. 163.

***The county line feature of the Florida law, which carried the maximum flat rate to $50 per unit, was disapproved by the Supreme Court. The statute also imposed a tax of $3 for every $1,000 of value of stock carried in each "store", which is disregarded in the above computation. Gen. Laws, Florida, Extra. Sess. (1931) ch. 15624, No. 24.

(a) The Difference Between this Case and the Case of Jackson v. State Board of Tax Commissioners, and Other Chain Store Cases.

It is pertinent to point out wherein the case of *Jackson v. State Board of Tax Commissioners*, 283 U. S. 527, does not render frivolous and unsubstantial the questions raised by appellee. That case decided that chain store operators and independent store merchants may be classified separately for purposes of taxation, *because* there are factual advantages in chain store operation which *distinguish* chain stores from independently-operated stores and from voluntary cooperative associations of independently operated stores. It was held that these *distinguishing advantages* justified a separate classification and a progressively graduated tax upon the group of chain store operators, based upon the number of store-units and rising to a maximum of $25 per unit. This Court pointed out in that decision that the statute treated "upon a similar basis all owners of chain stores similarly

situated." This was said apparently because the same unit measurement for the tax was applied to the entire group of chain store operators, and because, when compared to the situation of the independently-operated store, it could not be said that a progression up to $25 per store did not roughly and reasonably relate to the value of the privilege of operating a chain of stores and of adding stores to the chain. The Court, in its consideration of the *Jackson* case, did not have before it a tax which was either arbitrarily oppressive, *or which palpably and unreasonably discriminated between members of the chain store class.*

The Court held that a difference in fact may justify a difference in the tax, and recognized that there must be some correlation, albeit a rough and ready correlation, between the difference in fact and the difference in the tax. The difference in fact which the Court found was present was the advantage of operation through chain store methods and it was this advantage which justified the difference in tax treatment. But, when the tax treatment so far exceeds the advantage secured through chain store operation that any one must recognize that the treatment bears no relation to the advantage, then the tax ignores the difference in fact and bears no reasonable relation to the purpose of the statute.

Unwarranted Difference in Treatment of Single-Station and Multiple Station Operators

The West Virginia Act is presumptively valid as to typical store chains, such as grocery-store chains and drug-store chains, until the contrary is demonstrated by a "factual foundation of record." The appellee has presented the fact-

ual foundation as to its business, and as to the business of service stations generally, in this record. This factual background shows prominently that the establishment of the distributing companies' systems of service stations have not resulted in the elimination of single station operators. (SOPER, R. 259; CHESNUT, R. 267.) On the contrary, the record shows a determined purpose on the part of the companies to encourage and aid individual dealers. It shows also that the very nature of the business and the demands of the public require numerous small stations conveniently located. Chain store advantages are not the moving cause for the addition of new units. Indeed, the record shows that large numbers of stations are "accompanied by diminishing rather than increasing returns." (SOPER, R. 254-255.)

In the *Jackson* case the grocery store chain involved did not do a wholesale business. At every point in its activity, it was wholly antagonistic to, and competitive with, independent retail stores engaged in the same business. The appellee distributes petroleum products at wholesale and retail. Its products are available at company-owned stations, agency stations, and singly-operated stations (many of which latter type handle several leading brands). The single-unit dealer, handling appellee's products, has the cooperation of appellee's entire organization and the benefit of its business experience in meeting the competition of chain service stations handling other brands. Individual operators handling brands in competition with appellee's stations have similar cooperation from the distributors from whom they purchase. The appellee's mode of operation does not distinguish its stations from singly-operated stations. The "ultimate fact of common knowledge" (in the *Jackson* case) that the conduct of a chain of stores is a

form of merchandising quite apart from single-store merchandising has no counterpart in the service station business. The knowledge common to all persons familiar with the industry is that there is no essential economic advantage or opportunity in the service station business which is not shared by the single station operators. Consequently, the basis of the classification which was found in the *Jackson* and *Liggett* cases is not present here, and the differential between $250 and $2 in this Act, when applied to service station operation, does not even roughly measure any differences in fact between the single station and the multiple-operated station. The general legal principles governing classification announced in prior cases do not control the problem here presented. The *Jackson* case is not conclusive. It does not foreclose the question raised by appellee in this respect.

Unreasonable Discrimination Within the Chain Organization Class

The tax measure here is a chain store tax. It must operate, therefore, with at least a rough equality of burden, upon the class of chain organizations affected. If it fails to do this, and imposes an exceedingly onerous burden on one type of chain organization while permitting others to continue to operate practically untouched, then the tax measure is palpably discriminatory between members of the class created.

Service station systems characteristically have more units and much smaller average gross revenue per unit than ordinary store chains. Service stations pay all the taxes paid by the commodity store, and some special heavy burdens besides. While the appellant has always disparaged the contrast so drawn it is no accident that service station operators

will bear the brunt of this tax measure. The system of operating service stations through agents or licensed dealers is general throughout the country. It is especially applicable to a highly specialized and, therefore, comparatively simplified type of business. It inevitably will be true that a chain store tax measured according to number of units will fall with far greater force on the distribution of motor fuels and oils than on any other chain business. There are no chain organizations in West Virginia whose gross or net revenues are affected by the tax in anything like the same manner that it affects the five gasoline distributors in the $250 tax bracket.

The district court analyzed the prior cases on chain store legislation, and noting particularly (R. 255) that the "volume of business of oil companies does not increase in proportion to the number of stations maintained," said:

> "The graduated classification under the West Virginia statute rests only on the number of stores in the chain, and we have to consider whether this classification is reasonable when it appears that the practical effect thereof is to exact heavy taxes from a particular industry out of all proportion to the value of the privilege enjoyed. * * *
>
> "The Chain Store Tax cases in the Supreme Court did not involve a decision of the particular question with which we are now concerned, for the classification sustained therein did not rest merely upon numbers of stores." (R. 260-61.)

And, again (R. 264):

> "In short, since the amount of the tax is determined only by the number of stores, the addition of new stations, taxed at the highest rate fixed by the statute tends not to increase but to decrease the profits of the whole business; and the consequence is that

> as between members of the group composed of chain store organization, the differences, by which the gradations of the tax are fixed, rest solely upon ownership."

The district court recognized that the basis for sustaining this type of tax measure is an advantage in the chain mode of operation, not mere numbers. When the advantage secured through increase in the chain store organization is ignored as the basis for the tax, that is, when the increase in rates bears no relation to the value of the privilege of increase in number, then the only distinction is one of mere numbers.

That this Court in the *Jackson* case did not intend to create a precedent for every type of discriminatory chain store tax seems apparent from the case of *Liggett v. Lee*, invalidating the provision which increased the tax when units located beyond county lines were added to the chain organization. As the *Liggett* case is understood, the Court holds that there must be some relation between the tax and the *value of the privilege* of adding a store or stores to an existing chain. (288 U .S. 517, 534.) The *Jackson* case is not authority, we think, for a chain store tax in which "preference and repression go so far as to outrun the bounds of reason." (MR. JUSTICE CARDOZO, *Liggett v. Lee.*)

Upon a review of all these circumstances, JUDGE SOPER, speaking for the district court, said (R. 264):

> "In the present case, the highest rate of tax is $250 per store, and the total amount of the tax in every instance is fixed solely by the number of units without any reference to the amount of business done or profit gained. There results, as the evidence shows, the imposition upon one kind of chain organ-

> ization of a heavy burden of taxation which has no reasonable relation to the advantages conferred; for other businesses, enjoying all of the benefits of chain organization, and receiving a much greater revenue, pay a much smaller tax. So it must be said, when the practical effect of the statute is considered, that the sub-division of chain organizations into groups does not bear a fair and substantial relation to the object of the legislature; that all members of the class of chain organizations, similarly situated, are not taxed alike, and that the equal protection of the law guaranteed by the Fourteenth Amendment is denied."

The record of earnings does not *per se* establish the value of the privilege of adding units to a chain, and the district court by no means confined its consideration to that factor. Nevertheless, earnings are an important factor in determining the value of such privilege and one which can not be ignored.

Notable distinctions between service station systems and ordinary store chains consist in the difference in number of units per chain and in average gross revenue per unit. Appellant's application of the Act ignores these distinctions and reverses the relationship, placing a prohibitive tax on service station units and practically no tax on highly productive chain store units. Nothing in the *Jackson* case or in any case cited by appellant, forecloses the consideration of such facts.

These points are the basis of the more extended argument on the merits of the constitutional question of discrimination. It seems sufficient now to say that appellant can not properly term "trivial" and "unsubstantial" the very issues which all the members of the statutory court agreed were of sufficient gravity to control their decree.

B. THE APPLICATION OF HOUSE BILL NO. 112 TO THE APPELLEE'S SERVICE STATIONS VIOLATES THE EQUAL PROTECTION GUARANTY OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

1. Outline of Points Relied Upon by Appellant.

In various parts of the argument in support of his application of the statute to service stations, the tax commissioner contends for certain definite propositions. An outline of the answers to these propositions may clarify the issues before this Court.

(a) He contends that the legislative right to classify forecloses any question as to the validity of the graduated rates. (Brief, 26.) The company asserts that an academic discussion of classification without consideration of the rates and the graduation of the rates is an argument in *vacuo*. It is clearly impossible to decide as to the validity of the differentiation of subjects into classes, without giving consideration to the treatment which is to be predicated upon such classification and the practical effect of such treatment. The rates are the heart of a system of tax classification, and only upon consideration of such rates can it be determined whether such classification is rational and sound, or arbitrary and in violation of constitutional guaranties.

(b) He asserts that the legislature is the final judge of the rates and the graduation of the rates. (Brief, 35.) This proposition would withdraw from the judiciary the power to determine whether there has been arbitrary discrimination and denial of equal protection. The proposition that the Court may not consider the rates withdraws from judi-

cial consideration the very factor which renders the discrimination oppressive.

(c) He argues that even if the rates in the classification may be considered by the courts, the company has not shown the rates here involved to be confiscatory. (Brief, 38.) The ready answer to this is that confiscation is not an essential element of discrimination, but, answering the argument factually, the record does show that the tax attempted to be imposed confiscates the entire earnings of appellee's stations, and as to the other oil companies paying the highest rate, the tax is a capital levy.

(d) He leaves the definite impression that the company contends that it is not a "chain." (Brief, 27.) The company makes no such contention, and has never denied that it operates a system of service stations. It does contend, as the district court held, that the "combined characteristics" which feature typical chain store systems do not inhere in the operation of multiple service stations as compared with the operation of single stations. (CHESNUT, R. 268.)

(e) He asserts that the state may include all "stores" in a general class, or that it may sub-classify them into special kinds of "stores" (e. g. grocery stores, drug stores, etc.). He contends that here the state has chosen to adopt the broad classification. (Brief, 34.) Appellee does not deny the *power* of general classification. It does deny that service stations come within the category of "stores," and it contends that any broad classification and tax graduation which applies to service stations must bear some reasonable relation to the facts of the service station business.

(f) He urges that the classification and rates are related to the "purposes of the act," and that the purpose of the present Act was to lay a revenue tax on service stations. (Brief, 47.) The company does not challenge the power of the legislature to impose taxes on any business or privilege, but it specifically denies the right *to lay discriminatory burdens under the guise of a scheme of classification which bears no relation to the fundamental characteristics of the subjects of the classification.*

2. The Validity of the Appellant's Application of the Act is to be Determined from its Practical Effect Upon the Business of Operating Service Stations in the State.

(a) The Validity of a Taxing Statute is to be Determined from its Practical Operation and Effect.

The authorities are numerous and decisive that a tax measure is not to be viewed abstractly but that it must be tested in the light of its practical effect and operation. *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218; *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389; *Wagner v. City of Covington,* 251 U. S. 95; *Soper Opinion,* R. 263. Constitutional questions must be dealt with practically, not theoretically. *Bandini Petroleum Co. v. Superior Court,* 284 U. S. 8.

> "Taxes are very real things and statutes imposing them are estimated by practical results."
> *Nichols v. Coolidge,* 274 U. S. 531, 541.

These and many other cases establish the proposition that in determining the validity of tax legislation, it is of the

utmost importance to ascertain in what manner the tax affects the business or property against which it is laid. In this ascertainment, all form and artificiality in the legislation give way to substance and reality. *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 362; *Looney v. Crane Co.*, 245 U. S. 178, 189.

As a test of unconstitutionality, the necessary practical operation of a statute has the same controlling weight as a showing of deliberate design upon the part of the legislature to produce palpable inequality. In *County of Santa Clara v. So. Pac. Ry. Co.*, 18 Fed. 385, 398, MR. JUSTICE FIELD stated that a carefully devised scheme to produce inequality, *or a scheme, if not so devised, necessarily producing such result*, violates the Fourteenth Amendment.

A state tax law conflicts with the Fourteenth Amendment *when it proposes, or clearly results in*, flagrant and unwarranted inequality. *Dane v. Jackson*, 256 U. S. 589, 599; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 615; JUDSON, TAXATION (2d ed. 1917) p. 335.

Numerous state cases are hereinafter cited which show the controlling weight given by the courts to the necessary practical operation of a revenue measure. Finally, there is the statement in *Kehrer v. Stewart*, 197 U. S. 60, 69, that a discrimination resulting from the practical administration of a statute violates constitutional guaranties as much as one discriminatory upon its face. Whether or not the legislature so intended, the appellant's application of the Act to the business in which the appellee is engaged will inevitably produce gross inequality and destruction.

(b) The Practical Effect of the Act, as Administered, is to Single out the Business of Operating Service Stations, Already Heavily Burdened, as the Object of an Enormous Exaction.

While in form the tax imposed by this Act is an exaction upon the abstract privilege of operating multiple stores or units of a merchandising system, the substantial privilege which the appellee exercises is that of engaging in the distribution of petroleum products. The tax, if paid, must come from the proceeds of the business of operating service stations and outlets for gasoline and oils. The imposition of a special tax of almost a quarter of a million dollars upon the appellee alone, in addition to all other taxes and fees, as a condition of doing business, is not only an unequal and unconscionable exaction; it in effect is a destruction of a legitimate distributing organization and the valuable property rights devoted to that business. (CHESNUT, R. 270-271.)

It has been stated heretofore that the service station operators are called upon to pay 85.3% of the taxes collected under the statute, and that five companies, including the appellee, pay 83.5% of the total. The appellee alone pays approximately 2.7 times the amount collected from all taxpayers, exclusive of service stations, notwithstanding its revenue from sales in 1932 was not more than 2 per cent of the total sales of goods in the state.

If the interpretation placed upon the Act by the tax commissioner correctly reflects the legislative intent, the gasoline business, already heavily burdened with different forms of taxes, was singled out for additional exorbitant burdens,

and, with the exception of two grocery chains, a relatively inconsequential charge was imposed upon "stores" and "mercantile establishments" generally. The record shows that 9,276 taxpayers outside the gasoline business paid $83,-525. Deducting the amount paid under protest by the two grocery store chains, the record shows that the tax collected from 9,274 taxpayers was $32,535.

It is fair to test the discriminatory aspects of the tax by its effect upon the type of business which pays 85 per cent of the charge. For this reason the record has been made up so as to show the effect of the tax upon the service station business generally as well as upon the business of the appellee.

3. Analysis of the Record as to the Effect of the Statute Upon Operators of Service Stations.

Application of Tax to Stations of Appellee

Appellant takes the position that the appellee operates its service stations as part of a comprehensive system for the distribution of its products and that "the success or failure" of its business must be measured by the results of its entire system of operations. (Answer, R. 86.) The appellee denies the correctness of this view. The tax is not an imposition upon the company's general business or upon its properties. The Act is in terms applicable to "stores" in which goods, wares, or merchandise are sold. If applicable to the appellee, it is a tax upon the privilege of operating multiple stations or outlets at which petroleum products are sold. The reasonableness or unreasonableness of the charge must be determined by a study of the relationship of the tax to these several units and their operating results. It is en-

tirely irrelevant and immaterial whether appellee makes a large profit in the operation of the Parkersburg refinery (which it does not), or whether the companies with which it is affiliated make a profit from their production or transportation departments. The alleged integrated character of the oil business of the appellee is not involved here. Notwithstanding the heavy losses sustained in the operation of its refineries, the appellee furnished its refinery products to its marketing division at the current competitive prices, regardless of the cost.

The Act was passed in the year 1933, and sound authority compels the assumption that the legislature acted with reference to existing economic conditions. Furthermore, in so far as the reasonableness of the application of the tax to service stations is concerned, the state's revenue collections from distributors of motor fuels in West Virginia show that the year 1931 was the peak year of gasoline consumption, although the country was already well into the depression. They show further that the somewhat decreased consumption in 1932 was greater than that of the "good years" 1927-1929. See Table, R. 198. Therefore, the operating results of the appellee's business for 1931 and subsequent years afford a fair, as well as the only, test of the validity of the application of the statute to it. These operating results are summarized in the following table:

TABLE NO. 2

STANDARD OIL COMPANY OF NEW JERSEY

Summary of Sales and Net Earnings at all Stations in West Virginia for Calendar Years 1931, 1932, and First Six Months, 1933.

	1931	1932	6 Mos. 1933
Number Bulk Plants	78	63	54
Number Company and Agency Stations	911	1,046	949
Gallonage Petroleum Products	35,052,489.7	32,643,586.8	12,848,427.4
Revenue from Petroleum Products	$6,380,780.42	$6,093,701.68	$2,035,414.83
Revenue from Other Products	243,060.34*	166,495.16*	65,246.99*
Revenue from Services	81,502.82	58,816.12	23,920.60
Total Gross Revenue	$6,705,343.58	$6,319,012.96	$2,124,582.42
Average Gross Revenue per Station	7,360.42	6,041.12	2,238.76
Average Gross Revenue (bulk plants included)	6,779.92	5,697.94	2,118.23
Total Net Earnings	491,250.88	259,797.60	89,581.45**
Average Net Earnings per Station (bulk plants excluded)	539.24	248.37	94.31**
Chain Store tax computed on number of stations and bulk plants	236,666.50	266,726.50	240,173.50
Average Chain Store tax (computed)	239.29	240.51	119.71***
Percentage average "store" tax to average "gross"	3.5%	4.2%	5.6%

* Excluding sales of tires and other products to agency stations.
** Loss. Store tax not taken into account.
*** Six Months Only.

The figures in the foregoing table are impressive. The appellee's entire net earnings from service stations in the state for 1932 were only $259,797, or an average of $248.37 per unit. The computed chain store tax for 1932 would have absorbed the entire net profit for that year. The average net earnings at the 98 company-operated stations of the company in 1932 were $1,782.78, and for the first six months of 1933 there was an average loss of $379.50 at such stations. The stipulation (R. 151) shows that for the first eight months of 1933 the company earned a profit of $10,-314 at the company-owned stations which was converted into an average station loss of $48.64 by the application of the chain store tax.

The agency stations constitute the great majority of the outlets for gasoline and other petroleum products. Their possibilities for profit are definitely limited. While a number of these stations are substantial and well located, and do a comparatively large volume of business, the vast majority, particularly of the so-called vending-privilege type, yield at best very little net gain to the distributing company. The establishment of most of these vending-privilege outlets entails merely the placing of one or two gasoline pumps and a storage tank upon a small portion of the designated premises. The following tables (Nos. 3, 4 and 5) show the operating results at the appellee's agency stations for the years 1931 and 1932 and the first six months of 1933:

TABLE NO. 3 GROSS REVENUE AND NET EARNINGS TO APPELLEE FROM SALE OF PETROLEUM PRODUCTS AT LEASED OUTLETS AND VENDING PRIVILEGE OUTLETS (AGENCY STATIONS) GROUPED AND RANKED ACCORDING TO GALLONS OF MOTOR FUEL SOLD CALENDAR YEAR 1931

Group No.	Annual Gallonage Classification	No. Outlets In Group	Total Gross Revenue	Total Store Tax For Group	Total Net Earnings	Profit or Loss After Payment Store Tax		Gross Average Revenue Per Outlet By Groups	Average Store Tax Per Outlet	Average Net Earnings Per Outlet By Groups	Profit or Loss Per Outlet After Deducting Store Tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	257	$ 239,429.43	$ 61,497.53	$ 9,237.96		$ 52,259.57	$ 931.63	$ 239.29	$ 35.95		$ 203.34
2	10— 20,000	201	502,230.07	48,097.29	21,354.81		26,742.48	2,498.65	239.29	106.24		133.05
3	20— 30,000	121	494,398.41	28,954.09	20,394.83		8,559.26	4,085.94	239.29	168.55		70.74
4	30— 40,000	79	455,126.74	18,903.91	18,991.80	87.89		5,761.09	239.29	240.40	1.11	
5	40— 50,000	55	404,427.76	13,160.95	16,319.84	3,158.89		7,353.23	239.29	296.72	57.43	
6	50— 60,000	33	298,911.60	7,896.57	12,391.86	4,495.29		9,057.92	239.29	375.51	136.22	
7	60— 75,000	27	301,721.00	6,460.83	12,781.46	6,320.63		11,174.85	239.29	473.38	234.09	
8	75—100,000	24	342,941.31	5,742.96	13,584.96	7,842.00		14,289.22	239.29	566.04	326.75	
9	over 100,000	18	401,402.96	4,307.22	16,633.36	12,326.14		22,300.16	239.29	924.07	684.78	
	TOTALS....815		$3,440,589.28	$195,021.35	$141,690.88	$34,230.84	87,561.31					
						Net Loss.....	$ 53,330.47					

			For 815 Outlets	Per Outlet
Average Gross Revenue Per Outlet 815 Outlets combined, 1931.....	$4,221.58	Chain Store Tax based on computed average for 989 Units in 1931.....	$195,021.35	$239.29
Average Net Earnings Per Outlet, 815 Outlets combined 1931.....	$ 173.85	Net Earnings	$141,690.88	173.85
		Payment of Chain Store Tax out of Capital.....	$ 53,330.47	$ 65.44

TABLE NO. 4 GROSS REVENUE AND NET EARNINGS TO APPELLEE FROM SALE OF PETROLEUM PRODUCTS AT LEASED OUTLETS AND VENDING PRIVILEGE OUTLETS (AGENCY STATIONS) GROUPED AND RANKED ACCORDING TO GALLONS OF MOTOR FUEL SOLD CALENDAR YEAR 1932

Group No.	Annual Gallonage Classification	No. Outlets in Group	Total Gross Revenue	Total Store Tax For Group	Total Net Earnings	Profit or Loss After Payment Store Tax		Average Gross Revenue Per Outlet By Groups	Average Store Tax Per Outlet	Average Net Earnings Per Outlet By Groups	Profit or Loss Per Outlet After Deducting Store Tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	319	$ 307,080.18	$ 76,722.69	$ 4,384.00	$	$ 72,338.69	$ 962.63	$ 240.51	$ 13.74	$	$ 266.77
2	10— 20,000	247	637,075.07	59,405.97	12,672.63		46,733.34	2,579.25	240.51	51.30		189.21
3	20— 30,000	155	681,360.60	37,279.05	17,828.96		19,450.09	4,395.22	240.51	115.02		125.49
4	30— 40,000	96	586,096.07	23,088.96	15,016.10		8,072.86	6,105.16	240.51	156.42		84.09
5	40— 50,000	56	441,803.19	13,468.56	10,261.98		3,206.58	7,907.19	240.51	183.24		57.27
6	50— 60,000	22	211,534.59	5,291.22	3,007.07		2,284.15	9,615.20	240.51	136.68		103.83
7	60— 70,000	23	267,398.76	5,531.73	5,926.27	394.54		11,626.03	240.51	257.56	17.05	
8	70—100,000	16	236,816.12	3,848.16	4,217.99	369.83		14,801.00	240.51	263.62	23.11	
9	over 100,000	14	321,232.44	3,367.14	11,770.60	8,403.46		22,902.31	240.51	840.75	600.24	
	TOTALS....948		$3,690,397.02	$228,003.48	$85,085.60	$ 9,167.83	$152.085.71					
						Net Loss....	$142,917.88					

		For 948 Outlets	Per Outlet
Average Gross Revenue Per Outlet, 948 Outlets combined, 1932.....	$3,892.82	Chain Store Tax based on computed average tax for 1109 units in 1932.....	$228,003.48	$240.51
Average Net Earnings, Per Outlet, 948 Outlets combined, 1932.....	$ 89.75	Net Earnings	$ 85,085.60	89.75
		Payment of Chain Store Tax out of Capital	$142,917.88	$150.76

TABLE NO. 5 GROSS REVENUE AND NET LOSSES TO APPELLEE FROM SALE OF PETROLEUM PRODUCTS AT LEASED OUTLETS AND VENDING PRIVILEGE OUTLETS (AGENCY STATIONS) GROUPED AND RANKED ACCORDING TO GALLONS OF MOTOR FUEL SOLD FIRST SIX MONTHS 1933

Group No.	Annual Gallonage Classification	No. Outlets In Group	Total Gross Revenue For Group	Total Store Tax For Group	Total Net Operating Loss For Group	Profit or Loss After Payment Store Tax		Average Gross Revenue Per Outlet By Groups	Average Store Tax Per Outlet	Average Net Operating Loss Per Outlet By Groups	Profit or Loss Per Outlet After Deducting Store Tax	
						Profit	Loss				Profit	Loss
1	0— 10,000	585	$ 426,254.95	$ 70,033.28	$ 18,617.08		$ 88,650.36	$ 728.64	$ 119.72	$ 31.82		$151.54
2	10— 20,000	192	385,605.60	22,985.28	17,935.51		40,920.79	2,008.36	119.72	93.41		213.13
3	20— 30,000	45	154,443.59	5,387.18	7,232.26		12,619.44	3,432.08	119.72	160.71		280.43
4	30— 40,000	21	110,006.53	2,514.02	4,996.41		7,510.43	5,238.41	119.72	237.92		357.64
5	40— 50,000	5	31,984.82	598.58	1,465.87		2,064.45	6,396.96	119.72	293.17		412.89
6	50— 60,000	4	31,365.29	478.86	1,472.88		1,951.74	7,841.32	119.72	368.22		487.94
7	60— 75,000	2	17,801.78	239.43	835.66		1,075.09	8,900.89	119.72	417.83		537.55
8	75—100,000	1	13,209.25	119.72	612.08		731.80	13,209.25	119.72	602.08		721.80
9	Over 100,000	1	15,334.58	119.72	737.70		857.42	15,334.58	119.72	737.70		857.42
	TOTALS....	856	$1,186,006.39	$102.476.07	$ 53,905.45		$156,381.52					
					Net Loss.....		$156,381.52					

Average Gross Revenue Per Outlet, 856 Outlets combined, 1933..... $1,385.52

Average Net Operating Loss Per Outlet, 856 Outlets combined, 1933... $ 62.97

	For 856 Outlets	Per Outlet
Chain Store Tax Based on computed average tax for 1003 Units in 1933.....	$102,476.07	$119.72
Net Operating Loss.....	53,905.45	62.97
Total Loss After Payment of Chain Store Tax.....	$156,381.52	$182.69

The agency stations comprise approximately 85% of the total number of units upon which the appellee's tax for the year 1933 was computed. The three years embodied in the foregoing tables cover substantially the entire period of their operation. An analysis of the operating results at these many outlets for the three years shows the practical significance of the application of the statute to service stations.

In the peak year of gasoline consumption (1931) in West Virginia, the average gross revenue per agency outlet was $4,221.58, and the average net earnings but $173.85. A computation upon the basis of the number of units operated by the appellee in that year shows an average tax per unit of $239.29. In group 1, Table No. 3, consisting of 257 outlets, the average net gain was $35.95; in group 2, comprising 201 outlets, the average net gain was $106.24; in group 3, comprising 121 outlets, the average was $168.55.

Consider the data shown on Table No. 4 for the year 1932. The average gross revenue per outlet from the sale of petroleum products was only $3,892.82. A comparison of the computed average store tax of $240.51, based upon the number of bulk plants, service stations, and agency stations that the appellee had in operation in 1932, with its average net gain per agency outlet for that year, is in itself startling since the average net gain for these outlets in that year was but $89.75, scarcely more than one-third of the average tax per unit. There is no fact existent which will justify the imposition upon the appellee of an average tax for each of these outlets which is almost $150 greater than its average net earnings per outlet for the year.

In group 1, consisting of 319 outlets, the average net earnings were $13.74. In group 2, comprising 247 outlets,

the average net gain was $51.30, and in group 3, with 155 outlets, the average was $115.02. The average net gain for the 721 outlets in these three groups was $60.02, or about one-fourth of the average tax per unit. No amount of argument could accentuate the stark reality of these figures. In the next three groups, totaling 184 outlets, the average net gain per outlet for each group was measurably less than the average tax per outlet.

In group 7, the average net gain per outlet was $257.56, the highest net gain for any of these outlets was only $286.62, and the lowest $234.53. (Original Exhibit 3-a with stipulation.) Five of the 23 outlets in this group earned less than the computed average tax per outlet for that year. In group 8, the average net gain per outlet was $263.62, the highest net gain for any outlet of this group was $300.70, and the lowest $234.91. The net gain to the appellee from three of the 16 outlets in the group was less than the average tax per outlet. The 14 outlets in group 9 earned more than the average tax per outlet, but none of these outlets were of the vending-privilege type. In 1932 the average tax per unit would have exceeded the net earnings at 903 out of 948 agency stations, and would have approximated the average net earnings of $248.37 at both company-owned stations and agency stations for that year. Only seven of the appellee's 521 vending-privilege outlets earned as much as the computed average store tax per unit, and the result would be the same if the actual average store tax for 1933 were the basis of comparison. Even the most successful of these seven outlets earned only $280.28, and two of them barely earned the tax.

For the first six months of the year 1933, Table No. 5 shows an average net loss per outlet of $62.97 prior to the payment of the average store tax per unit. The average gross revenue per outlet for the period was $1,385.52. It is not probable that any outlet earned as much as the average tax of $239.43 per unit over the entire year.

The figures emphasize the fact that a system of graduated taxes based solely on numbers of units must inevitably impose a burden on service stations far greater than upon other lines of multiple unit business, and without any basis in fact upon which to predicate such excessive burden.

Stations of Five Companies Subject to the Maximum Rate of $250

It has been stated that the tax constitutes a prohibitive exaction upon all five distributing companies falling within the highest bracket of the tax. In point of fact, as to the four companies other than the appellee, the tax, upon the basis of 1932 operations, amounts to a substantial capital levy. The constitutional questions, therefore, may be judged either from the standpoint of the five companies as a group or of the appellee alone.

If the store tax had been operative in the year 1932 it would have been equivalent to approximately .8 of a cent per gallon (13.3% of the refinery billing price) on motor fuels sold at all the company-owned and agency stations of the appellee. At the 948 agency stations in operation during that year the tax would have averaged in excess of one cent per gallon, as compared with the .4 cent per gallon profit which such stations earned during the period. At

the 319 stations selling less than 10,000 gallons of motor fuel the tax would have exceeded 4 cents per gallon. At a number of the smallest stations the tax would have been as high as 15 cents per gallon on all gasoline sold.

All the distributing companies are in competition with each other. The tax of the Gulf Refining Company would have been equivalent to 1.2 cents per gallon (20% of the market price at the refineries). The tax on the Pure Oil Company would have been equivalent to .27 cent per gallon. On the Sinclair Refining Company and the Ashland Refining Company it would have been equivalent to .41 cent per gallon of motor fuels sold at their respective stations. It would not be possible for any of these companies to pass this tax directly to the consumer when other distributing companies having more than one station in the state pay an average tax per station of only $15.10. Reduced to cents per gallon of motor fuels sold, the tax paid by other distributing companies doing business in the state and operating few agency stations, such as The Texas Company, the Atlantic Refining Company, the American Oil Company, the Elk Refining Company, and the Sterling Oil Company, is so insignificant as to give them no cause for concern. The general public will not purchase its motor fuel requirements from the Gulf Refining Company at an increase of 1.2 cents per gallon, nor from the appellee at an increase of .8 cent per gallon, when other companies pay a tax so small that they can easily absorb it.

TABLE NO. 6 COMPARISON TAXES PAID BY SERVICE STATION OPERATORS, STATE OF WEST VIRGINIA, FISCAL YEAR ENDED JUNE 30, 1933

1	2	3	4	5	6	7	
Name of Operator	Gross Sales License Tax Refining of Petroleum Products.	Gross Sales License Tax Wholesale and Retail Dealing in Petroleum Products.	Gasoline Gallonage Tax	Number of Bulk Plants Service Stations, and Outlets Taxed Under Chain Store Act 1933.	Chain Store Tax 1933.	Average Chain Store Tax per Unit 1933.	
1. Standard Oil Company	$10,965.91	$ 2,197.48	$1,160,770.89x	1,003	$240,173.50	$239.45	1
2. Gulf Refining Company	—	1,844.93	653,072.92	779	184,061.50	236.28	2
3. Pure Oil Company	4,045.33	339.93	401,281.00	151	26,747.50	177.13	3
4. Ashland Refining Company	443.38	172.45	85,862.04	95	12,719.50	133.88	4
5. Sinclair Refining Company	—	49.84*	99,381.66	94	12,469.00	132.54	5
6. Bell Oil Products Company	—	385.28	10,554.96	40	1,692.00	42.30	6
7. South Penn Oil Company	429.56	773.88	44,093.64	31	787.50	25.08	7
8. American Oil Company	—	1,242.65	536,109.14	27	580.50	21.50	8
9. Viking Distributing Company	—	483.73	90,943.80	23	421.00	18.30	9
10. Elk Refining Company	3,213.91	—	181,440.36	22	403.00	18.31	10
11. Sterling Oil Company	—	863.27	22,942.40	20	332.00	16.60	11
12. Spears Bros., Inc.	—	678.84	67,631.32	9	66.50	7.37	12
13. The Texas Company	—	190.52*	163,036.06	9	66.50	7.37	13
14. Atlantic Refining Company	—	121.64	75,277.45	5	24.50	4.90	14
15. Dinsmoor & Company	—	—	2,246.68	4	19.00	4.75	15
16. Maynard's Service Stations	—	225.00	—	4	19.00	4.75	16
17. National Refining Company	—	7.80*	6,527.12	4	19.00	4.75	17
18. Freedom Oil Works Company	—	58.76	44,393.95	3	13.50	4.50	18
19. Shell Petroleum Corp.	—	74.01	25,259.28	3	13.50	4.50	19
20. Federal Oil Company	—	—	621.20	2	8.00	4.00	20
21. Southern Oil Company	5.13	134.94**	1,086.92	2	8.00	4.00	21
TOTAL	$19,103.22	$ 9,844.45	$3,672,532.79	2,330	$480,644.50		
GRAND TOTAL OIL INDUSTRY	$22,770.82	$12,225.18	$5,076,863.98	4,453	$486,168.00		

TABLE NO. 6 (continued)

COMPARISON TAXES PAID BY SERVICE STATION OPERATORS, STATE OF WEST VIRGINIA, FISCAL YEAR ENDED JUNE 30, 1933 (continued)

		8	9	10	11	12	13	14	15	
		Percentage of Tax Shown in Column 2 to Total Gross Sales Tax of $22,770.82 Paid by Refiners of Petroleum Products.	Percentage of Tax Shown in Column 3 to Total Gross Sales Tax of $12,225.18 Paid by all Wholesale and Retail Dealers in Petroleum Products.	Percentage of Taxed Units Shown in Column 5 to Total of 4,453 Bulk Plants, Service Stations, and Outlets.	Percentage of Tax Shown in Column 4 to Total Gasoline Gallonage Tax of $5,076,863.98 Paid in State.	Percentage of Tax Shown in Column 6 to Total Chain Store Tax of $486,168 Paid by Service Station Operators.	Ratio Gallonage Tax Percentage (11) to Chain Store Tax Percentage (12).	Percentage of Tax Shown in Column 6 to Total Collections of $569,693.06 Under Chain Store Act.	Chain Store Tax Shown in Column 6 Reduced to Cents per Gallon Motor Fuel on Basis of Gallonage Tax Column 4, at 4c per Gallon	
1.	Standard Oil Company	48.15	17.97	22.52	22.86	49.40	1 : 2.16	42.16	.83	1
2.	Gulf Refining Company	—	15.09	17.49	12.86	37.86	1 : 2.9	32.31	1.13	2
3.	Pure Oil Company	17.77	2.78	3.39	7.90	5.50	1.4 : 1	4.70	.27	3
4.	Ashland Refining Company	1.95	1.41	2.13	1.69	2.62	1 : 1.6	2.23	.59	4
5.	Sinclair Refining Company	—	.41*	2.11	1.96	2.56	1 : 1.3	2.19	.50	5
6.	Bell Oil Products Company	—	3.15	.90	.21	.35	1 : 1.7	.30	.64	6
7.	South Penn Oil Company	1.89	6.33	.70	.87	.16	5.4 : 1	.14	.07	7
8.	American Oil Company	—	10.16	.61	10.56	.12	88 : 1	.102	.004	8
9.	Viking Distributing Company	—	3.96	.52	1.79	.087	20.6 : 1	.074	.019	9
10.	Elk Refining Company	14.11	—	.49	3.57	.083	43 : 1	.0707	.009	10
11.	Sterling Oil Company	—	7.06	.45	.45	.068	6.6 : 1	.058	.058	11
12.	Spears Bros., Inc.	—	5.55	.20	1.33	.0137	92.1 : 1	.012	.004	12
13.	The Texas Company	—	1.56*	.20	3.21	.0137	234.3 : 1	.012	.002	13
14.	Atlantic Refining Company	—	.99	.11	1.48	.005	296 : 1	.004	.001	14
15.	Dinsmoor & Company	—	—	.09	.04	.0039	10 : 1	.0033	.034	15
16.	Maynard's Service Stations	—	1.84	.09	—	.0039	—	.0033	—	16
17.	National Refining Company	—	.06*	.09	.13	.0039	33.3 : 1	.0033	.012	17
18.	Freedom Oil Works Company	—	.48*	.07	.87	.0028	310.7 : 1	.0024	.001	18
19.	Shell Petroleum Corp.	—	.605	.07	.50	.0028	178.6 : 1	.0024	.002	19
20.	Federal Oil Company	—	—	.04	.01	.0016	6 : 1	.0014	.052	20
21.	Southern Oil Company	.02	1.10**	.04	.02	.0016	12 : 1	.0014	.029	21

x Standard Oil Company tax on gallonage sold at company stations and agency stations only. Total gallonage tax amounted to $1,739,346.04.

* Wholesale Tax Only.
**Retail Tax Only.

Application of the Tax to the Service Station Business in the State

The tax commissioner has furnished information as to various distributing companies whose petroleum products are handled in West Virginia through bulk plants, service stations, and agency or contract outlets, ranging in number from 2 to 1,003. (R. 199.) The list is a representative one for the purpose of making pertinent comparisons and of examining the effect of the application of the Act to operators of service stations and outlets for petroleum products. Table No. 6 shows the number of units upon which each listed company was taxed by the tax commissioner under the Act. It further shows the amount of such chain store taxes, the amount of business and occupation (gross sales) taxes, and the amount of gasoline gallonage taxes paid to the state. The figures are for the fiscal year ending June 30, 1933, as the period closest to the date of the passage of the Act.

Gross sales taxes and gasoline gallonage taxes afford two fair indices of the business done in the state by these companies. Consequently, in the case of each listed company a percentage is given expressing the relation between the number of units taxed to each company and the total number of service stations and outlets in the state (column 10), and percentages are also given showing the ratios of the amount of gross sales, gallonage, and chain store taxes paid by each company to the total of such taxes paid by all dealers in petroleum products (columns 9, 11, and 12, respectively).

The table shows that the appellee paid 17.97% of the total gross sales taxes paid by wholesale and retail dealers

in petroleum products, that it operated 22.52% of all the bulk plants, service stations and outlets in the state at the effective date of the Act, and that it sold through company-owned and agency stations 22.86% of all motor fuel gallonage handled therein as measured by gallonage taxes. On the other hand, the appellee paid $240,173.50 in chain store taxes, or 49.4% of the total of such taxes paid by service station operators. From the percentages shown in columns 11 and 12, and the ratios of such percentages, as shown in column 13, it appears that the appellee's share of the total chain store tax was 2.16 times its share of the gallonage tax. As to the other four companies operating more than 75 stations, the ratio of the percentage of store tax paid by each to the percentage of gallonage tax paid by each ranges from 1:1.4 in the case of the Pure Oil Company to 2.9:1 in the case of the Gulf Refining Company. These ratios should be considered together with some of the comparable figures applicable to the other distributing companies in the table, for example, the Atlantic Refining Company whose ratio is 1:296, the American Oil Company with a ratio of 1:88, and The Texas Company with a ratio of 1:234. If the ratios were based upon the gross sales tax percentages shown in column 9, they would be even more divergent.

The gross discrimination effected by applying this Act to service stations is further illustrated in column 15 where it is shown that, for the fiscal year 1933, the chain store tax of the appellee amounts to .83 cent per gallon of motor fuels sold through company-owned and agency stations. The Gulf tax is equivalent to 1.13 cents per gallon, the tax of the Pure Oil Company to .27 cent per gallon, the tax of the Ashland Refining Company to .59 cent per gallon, and

the tax for the Sinclair Refining Company to .5 cent per gallon. In contrast, the chain store taxes of the aforementioned Atlantic Refining, American Oil, and Texas companies are equivalent to .001, .004, and .002 cent per gallon, respectively.

This is the situation confronting the five highly taxed distributing companies. The comparison of these percentages is one basis for the appellee's contention that the taxation of service station operators, at steeply graduated rates upon the mere number of units, effects an arbitrary discrimination. The burdens cast upon the appellee and other operators of more than 75 service stations are far removed from any relevant facts in the service station business. They are vastly greater than those they would bear under a rational theory of classification.

A comparison of strictly competitive stations in the same neighborhood in the larger cities in the state has been made. There are a number of such illustrations in the record which further show the inequities in the operation of the statute, especially as to appellee. The motor fuel sales in gallonage, the gross revenue, and the average chain store tax at these competitive stations have been summarized in the following table:

(Table No. 7 Appears on Pages 46 & 47)

TABLE NO. 7 COMPARISON MOTOR FUEL GALLONAGE, GROSS REVENUE, AVERAGE CHAIN STORE TAX FOR SERVICE STATIONS GROUPED ACCORDING TO COMPETITIVE LOCATIONS (SEE PHOTOGRAPHS EXHIBIT 6, STIPULATION).

Group	Name of Company	Location	Motor Fuel Gallons Calendar Year 1932	Gross Revenue* Calendar Year 1932	Average Chain Store Tax Per Station 1933
	Standard Oil Company	Washington & Greenbrier Sts.	162,486	$32,400.00	$239.45
A	Viking Distributing Co.	Washington & Greenbrier Sts.	148,248	25,488.00	18.30
Charleston	American Oil Company	Washington near Greenbrier St.	218,905		21.50
B	Eastern Garage, Standard agency	Elizabeth St. near Jackson	51,153	8,600.54	239.45
Charleston	Elk Refining Company	Elizabeth & Jackson Streets	55,827	7,778.76	18.32
	Standard Oil Company	Midland Trail, Kanawha St.	198,704	37,194.00	239.45
C	Pure Oil Company	Midland Trail, Kanawha St.			177.13
Charleston	American Oil Company	Kanawha & Washington Streets	106,067	16,514.69	21.50
	Standard Oil Company	Cleveland & Locust Streets	145,521	27,736.00	239.45
D	American Oil Company	Jackson & Jefferson Streets	182,453	30,046.00	21.50
Fairmont	Freedom Oil Works Company	Jackson & Jefferson Streets	133,192		4.50

E Huntington	Standard Oil Company	3rd Ave. and 14th Street	112,340	19,457.00	239.45
	Elk Refining Company	3rd Ave. and 15th Street	75,766	11,418.00	18.32
	Gulf Refining Company	3rd Ave. and 15th Street	85,767	13,264.00	236.28
F Huntington	Standard Oil Company	5th Ave. and 31st Street	134,709	23,636.00	239.45
	Gulf Refining Company	5th Ave. and 31st Street	126,213	19,575.00	236.28
	South Penn Oil Company	5th Ave. and 31st Street	33,474	5,755.00	25.40
G Parkersburg	Standard Oil Company	6th, 7th and Ann Streets	177,959	29,636.00	239.45
	Gulf Refining Company	7th and Juliana Streets near Ann St.	95,696	12,876.00	236.28
	Pure Oil Company	7th and Juliana Sts.			177.13
	Sterling Oil Company	8th and Murdock Avenue	160,601	21,664.00	16.60
H Wheeling**	Standard Oil Company	Byrd Ave. and National Road	60,413	11,576.00	119.72
	American Oil Co., dealer	National Rd. near Byrd Ave.	39,431		10.75
	Sun Oil Co., dealer	National Rd. near Byrd Ave.	86,986		1.25
	Spears Bros., Inc.	National Rd. near Byrd Ave.	66,161	10,130.00	3.64
I Charleston	Park Your Car Co.				
	(a) Standard Agency	Dickinson St. near Lee St.	87,554	13,891.78	239.45
	(b) Ashland Agency	Lee St. near Dickinson St.	34,030	5,400.52	133.89
	Elk Refining Company	Dickinson St. near Lee St.	67,289	9,771.21	18.32

* Gross Revenue, excluding state and federal gallonage taxes. The figures for the Standard Oil Company stations include all gross revenue from petroleum products, accessories, and services.

** Figures for six months, 1933, only.

The stations in a given competitive group are operated by different distributing companies. They are located within a short distance of each other, usually upon the corners at the intersection of two streets. Their methods of operation are substantially the same. (R. 187-89.) They are similar in appearance. The volume of business at each of the stations is not materially different.

Yet, this study shows that the American Oil Company stations in groups A and D had larger gross gallonage than any of their direct competitors at the same locations and are subject to an average store tax of only $21.50 per station. The stations of other oil companies in these groups likewise bear nominal taxes, for example, $18.30 for a Viking Distributing Company station, $18.32 for an Elk Refining station, $16.60 for a Sterling Oil Company station, and $4.50 for a station of the Freedom Oil Works Company. The stations of the appellee, on the other hand, are assessed with an average tax of $239.45, although they handle petroleum products under comparable conditions. The appellee could not possibly increase its prices at these locations in an attempt to earn the tax. What is shown for these illustrative locations is true generally throughout the state. Gross discrimination is apparent. The saddling of prohibitive burdens upon a business is unwarranted when at the same time others in the same business operating similarly are very lightly taxed. The guaranty of equal protection of the laws here invoked is not an assurance that taxes will be imposed under all conditions and times which will enable all businesses and industries to operate profitably, but surely they give an assurance of equality of opportunity for those engaged in the same business under substantially similar conditions.

The Position of the Single Station Operator

In the field of service station operation all types of stations, including the individually-operated single station, enjoy substantially the same opportunities for business. That is the fact as to the distribution of appellee's petroleum products, and sufficient facts have been marshalled in the record with reference to other distributing companies to indicate that the conduct of the appellee's business is representative generally of both large and small distributing organizations. (R. 187-190.)

The conditions under which the singly-operated stations do business are similar in all essential particulars to those existing at the service stations of the appellee and of the other four companies subjected to the maximum rate of $250 per station. (R. 183.) Such stations handle the same grades of products, under the same distinctive brands, and, in practically all communities, at the same retail price. (R. 183, 185.) The appellee and similar companies furnish operators of single stations with advertising matter and vending equipment, and urge such dealers to take advantage of their marketing information, and promotional and sales aids. (R. 173.)

The relation of man-hours to gross revenue is approximately the same at all types of stations handling the appellee's products. The cost of utility service is a fairly constant factor at all stations. The benefit of any improvement in product and the benefit of advertising media is passed on to the operators of single stations as well as to other stations. (R. 184-5.) The company by its system of tank-wagon tickets and invoices supplies a uniform accounting system for such

dealers. (R. 161.) Group meetings, moving pictures, general salesmen, and expert supervisors aid in training the dealers to learn the operating methods prevailing at company stations. (R. 186.)

The distributing companies make some slight distinction in price to agency stations handling their products exclusively and to individual operators, but there is substantial uniformity in their price policies. The price policy of the appellee is representative. The gross margin of profit to the agency dealer consists of 2½ cents spread between wholesale and retail price and 1 cent per gallon rental, the agent usually being also the lessor. The spread between the wholesale and retail price at individually-operated single stations is shown to be 3 cents. The operations for the year 1932 show that the net profit of appellee on all petroleum products sold at agency stations was equivalent to .4 of a cent on each gallon of gasoline sold therefrom; a profit of .48 cents at individually-operated stations and 3.85 cents at company-owned stations. Out of the latter figure came the operating expenses and any return upon the investment in such stations.

The stipulation shows that the operators of one station or a small number of stations compete on even terms with the appellee, with whom they are in direct competition for retail trade. See figures as to Spears Brothers; Maynard Service Stations, Inc.; Defiance Service Station; J. A. Blake; Lane's Garage; Park Your Car Company. (R. 191-195.)

Multiple Service Stations and
Commodity Chain Stores Compared

It is characteristic of the gasoline distributing companies that they greatly exceed all other businesses in number of units, and the tax imposed by the act in question is sharply increased by number of "stores". At the 2,453 multiple-owned service stations, the gross sales in 1932 amounted to $15,198,638, or 4.6% of the gross sales of all "stores" in the state; whereas the operators of these stations paid 84.46% of all the chain store taxes assessable against "stores" in the state.

In the same year, 1,889 units of commodity chain stores, many of which are nation-wide in the scope of their activities, had gross sales of $75,454,257, or 22.9% of all gross sales in the state; while these same commodity chain stores were chargeable with only $60,785, or 10.7% of all "store" taxes which would have been assessed as of that year. *The "store" tax on the 2,453 multiple-owned service stations would exceed 3% of their gross revenue, while the commodity chain stores would pay less than 1/12 of 1%.* (R. 277.)

Table No. 8, based upon data in the record, shows the extent of the business done in the state by representative commodity store chains for the years 1931, 1932 and 1933.

TABLE NO. 8

VOLUME OF SALES—REPRESENTATIVE COMMODITY CHAINS

STATE OF WEST VIRGINIA

Name of Chain	1933			1932		1931	
	No. of Stores	Chain Store Tax	Average Chain Store Tax Per Store	Gross Revenue	Average Gross Revenue Per Store	Gross Revenue	Average Gross Revenue Per Store
Louis K. Liggett Co.	1	$ 2.50	$ 2.50	$ 97,619	$ 97,619	$ 106,538	$106,538
Whelan Drug Co.	1	2.50	2.50	93,312	93,312		
Kay Jewelry Co.	2	8.00	4.00	116.717	58,358	162,438	81,219
Sears, Roebuck & Co.	4	19.00	4.75	562,861	140,715	630,808	157,702
G. R. Kinney Co.	7	45.50	6.50	235,824	33,689	278,722	39,817
Montgomery, Ward & Co.	7	45.50	6.50	1,058,083	151,154	935,976	133,710
O. J. Morrison Stores	11	97.50	8.86	1,523,033	138,457	2,042,236	185,657
S. S. Kresge Co.	12	118.00	9.83	1,685,141	140,428	1,998,880	166,566
F. W. Woolworth Co.	21	367.50	17.50	1,778,671	84,698	2,203,859	104,945
Kroger Grocery & Baking Co.	94	12,469.00	132.64	5,499,343	58,503	6,099,555	63,718
Great A. & P. Tea Co.	198	38,521.00	194.55	12,455,017	62,400	14,260,559	72,023

The table contained in the findings of the district court (R. 278) compares certain commodity store chains with the business of the appellee. The following tabulation, based upon the figures for 1932 and the findings of fact by the court, relates the "store" tax to the gross earnings of the commodity chains and of the appellee:

TABLE NO. 9

RELATION OF "STORE" TAX TO GROSS REVENUE—REPRESENTATIVE COMMODITY STORE CHAINS — STANDARD OIL COMPANY OF NEW JERSEY.

CALENDAR YEAR 1932.

(Based on Record 196, 205)

	No. of "Stores"	Average Chain Store Tax Per "Store"	Average Gross Revenue Per "Store"	Per Cent of Gross Revenue
Whelan Drug Co.	1	$ 2.50	$ 93,312	1/384 of 1%
Louis K. Liggett Co.	1	2.50	97,619	1/400 of 1%
Kay Jewelry Co.	2	4.00	58,358	1/147 of 1%
Sears, Roebuck & Co.	4	4.75	140,715	1/296 of 1%
G. R. Kinney Co.	7	6.50	33,689	1/52 of 1%
Montgomery, Ward & Co.	7	6.50	151,154	1/232 of 1%
O. J. Morrison Stores	11	8.86	138,457	1/156 of 1%
S. S. Kresge Co.	12	9.83	140,428	1/142 of 1%
F. W. Woolworth Co.	21	17.50	84,698	1/50 of 1%
Kroger Groc. & Bak. Co.	94	132.64	58,503	1/4 of 1%
Great A. & P. Tea Co.	198	194.55	62,400	1/3 of 1%
Standard Oil Co.	1109*	240.51	5,697*	4.2%

* District Court's figures (R. 251, 278) excluded bulk plants in total stations and in average gross revenue.

The average gross revenue per station of the appellee for company-owned and agency stations, combined, was approximately $7,000 for the year 1931, and approximately $6,000 for the year 1932. The average gross earnings of the commodity chains above listed ranged from $33,689 to $151,-154 per store for the year 1932. Appellee's average chain store tax for the year 1932 would have been approximately

$240, or 4.2% of the gross revenue, whereas, the nationally known organization of Montgomery, Ward & Co., with an average gross revenue of $151,154 per store in that year would have paid an average tax of $6.50 per store, or 1/250 of 1% of the gross revenue for the year. While the average gross revenue per store of the Kroger Grocery & Baking Company was over nine times the average gross revenue of appellee's stations, the average "store" tax of the appellee was almost twice the average tax of $132.64 per store for the Kroger Company. The volume of business done by the Great Atlantic & Pacific organization in West Virginia during 1932 was practically twice the business of the appellee, but the former would have paid a tax of $38,521, while the appellee would have been charged in that year with at least $240,000, or more than six times the tax of the national chain. While the gross revenue of the above ten chain store organizations in West Virginia during 1932 was $24,962,309, or practically four times the gross revenue of the appellee from its 1109 service stations and bulk plants, the appellee, with a gross revenue of $6,319,012 for that year, would have been required to pay $266,726.50, whereas the total store tax of the ten companies listed above would have been $51,693.50. Further reference to the record shows that in 1932 the total gross revenue of all taxpayers now subject to the "store" tax was $328,562,161, while the gross sales of all gasoline dealers aggregated but $20,356,338.94, or 6.2% of the whole, yet the gasoline dealers are now required to pay approximately 6 times the amount of store taxes paid by all other taxpayers.

4. THE APPLICATION OF THE ACT TO SERVICE STATIONS IS AN IMPOSITION OF PALPABLY ARBITRARY AND DISCRIMINATORY RATES OF TAXATION WITHOUT RATIONAL RELATIONSHIP TO THE VALUE OF THE PRIVILEGE SUBJECTED TO THE TAX.

Appellee asserts that the discriminatory and arbitrary graduation of the rates, and the excessive amount of the tax in the highest bracket, imposes a burden upon it which is without any reasonable relationship to the factual differences between the business of operating multiple service stations and the business of operating a system of chain commodity stores. It asserts that the application of the Act effects a gross discrimination against the appellee and the four other oil companies operating more than 75 service stations in the state, and in favor of other refining and distributing companies operating smaller numbers of units. It further asserts that there is no factual difference between the operation of multiple stations and single stations to justify the wide difference in classification and tax treatment accorded by the statute.

Appellant in his answer replies that the classification is "well established in law and in fact." (R. 102.) He considers that the decision of this Court in the *Jackson* case forecloses any judicial inquiry as to the validity of any classification of business by the number of "stores", no matter what the nature of the business, the character or size of the "stores", the amount of the tax or the irregularities in the graduation.

Appellant further relies upon *Magnano v. Hamilton, Attorney General*, 78 L. ed. (Adv.) 712. That decision, as we understand it, sustains the view that different taxable

subjects (*e. g.*, oleomargarine and butter being distinct for that purpose) may be taxed at widely different amounts, or one such subject may be oppressively taxed and the other may not be taxed at all. This principle is not new, but it does not follow that members of the same class (chain organizations) may be taxed at such widely different and variant amounts that the difference in tax treatment bears no factual relationship to the difference in the taxable attributes of such members.

The district court, after reviewing the chain store tax cases, states the principle that, in measuring the amount of a chain store tax, it is not *per se* arbitrary or unreasonable to increase the tax on all stores in a chain when a new store is added. (R. 262.) But, having thus recognized the principle of chain store taxation, the court penetrates the issue by the question:

> "Does it follow that a classification of chain store organizations is reasonable which has regard merely to the number of units in a chain, no matter how disproportionate the burden may be in its practical effect when the tax is applied to different members of the group?" (SOPER, R. 262.)

Appellee understands that this Court has answered JUDGE SOPER'S question in *Louisville Gas Co. v. Coleman*, 277 U. S. 32, and in other cases, where it was said that classification for tax purposes "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

The *Louisville Gas Company* decision is a concrete case in which this Court invalidated a tax because of the *dispropor-*

tionate amount of the tax in the classification. The Court recognized the gross inequality in a 0.2% tax on five year mortgages, when mortgages of lesser duration were *entirely* exempt, and laid down the very proposition relied upon here that a smaller differential might have been reasonable and valid. It was stated that in fixing the *amount* of the tax it was within the power of the legislature to consider the differences in the duration of the mortgages and to *proportion* the rates with reference thereto, but that the power did not exist to fix a tax schedule in which owners of some mortgages were heavily burdened and owners of other mortgages, identical except as to duration, were exempt. The legislature had adopted as a basis for the classification a circumstance which affected only *taxable value* and it was held that the tax treatment could not grossly violate the difference in value between short-term and long-term mortgages. A tax graduated according to the increased number of units is likewise fundamentally based on conceived differences in taxable value—the legislature could not have had in mind a difference in "kind and character" in levying such a tax—and a chain store tax schedule which, in practical operation, grossly ignores such taxable values is as plainly discriminatory as the tax considered in the *Louisville Gas* case. In *Air-Way Electric Appliance Co. v. Day*, 266 U. S. 71, this Court said that "the mere number" of authorized shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of annual fees. This does not imply, as we understand the decision, that the number of such shares may not be *considered* in fixing the fees, but means that factors other than "mere number" must enter into the classification.

As appellant concedes the principle that classification must be supported by reasonable grounds of difference, it well

may be asked: what constitutes such a reasonable "ground"? In every case in which this question is presented to a court, its solution necessarily rests on the relation between two factors: first, the distinction sought to be established as valid; second, the difference in treatment which the state seeks to predicate upon that distinction. It is abundantly clear that the problem never can be solved by attention merely to the first factor. To attempt to do so would lead to absurdity; for example, a court might be faced with this blank question: Does there exist a "substantial difference" between motion picture theaters seating more than one thousand persons and those seating fewer than that number? It is obvious that no court would or could answer this question, without more information. If the distinction were being drawn as the basis for some reasonable safety measure, *e. g.*, the number of exits or width of aisles, it would no doubt be sustained as valid. If, on the other hand, the law further provided that the larger theaters should be subject to a film censorship and the smaller theaters exempt therefrom, the classification might well be deemed "unreasonable", and the difference branded "unsubstantial". To give a closer parallel: whereas it might be entirely reasonable to classify stores in towns of over ten thousand inhabitants, and to subject stores therein located on side streets to a tax of $100 each, and stores located on main business streets to a tax of $110, it would almost certainly be regarded as a denial of equal protection—an unreasonable discrimination—if the latter were taxed $10,000 each. The existence of a "substantial difference" does not *per se* give the legislature a free rein in fixing the graduations and the amount of the exactions in a scheme of classified taxation.

Again, suppose that a chain store tax statute provided for a tax of $1,000 on the first store, but in the case of the addition of five further stores, the tax on each store, including the first, should be $5, could anyone say that the legislature had exercised a rational discretion? Or suppose that the legislature should classify stores by volume of gross sales, and then arbitrarily assess the highest tax against the stores having the lowest sales. All of which is to say that the differences in legislative treatment are as significant as the differences in fact upon which the treatment is predicated.

If (as in the *Louisville Gas* case) the differences which may warrant a reasonable graduation of rates do not necessarily warrant the taxing of some members of a taxable class (mortgages) and the exemption of others; by like reasoning differences may be sufficient to warrant a schedule of rates rationally graduated, but insufficient to justify prohibitive exactions upon certain members and merely nominal rates, which amount to a practical exemption, upon others. The difference between exemption and an insignificant tax is one of degree only.

Although Mr. Justice Holmes dissented in the *Louisville Gas* case, he has been one of the foremost exponents of the theory that the differences of which the courts speak are differences in degree, and in this very dissent he reaffirmed his adherence to the view that the Court should strike down any legislative enactment which falls "very wide of any reasonable mark." Both the majority of the Court and Mr. Justice Holmes support the principle upon which we rely. The application of the present Act to the service station business produces an inequality and injustice more substantial than was presented to the Court by the facts of the *Louisville Gas* case.

Differences may justify a proportioned tax; they may not be sufficient to support progressive graduation. Similarly, a difference may justify moderate progression in graduation, but may be insufficient to support a much more radical progression. A classification may be based upon a difference in fundamental character. In such a case the difference in tax may be wide. Thus, the tax imposed under the provisions of sections 2 and 3 of article 14, chapter 11, CODE OF WEST VIRGINIA, upon every filling station, could not be objected to on the ground that the statute failed to tax grocery stores. On the other hand, long term mortgages may not be taxed and short term mortgages exempted or practically so. The comparison brings out an important distinction between two very different sorts of classifications.

It is clear that the necessary "substantial difference" is not an absolute thing, immutable; inevitably, the "substantiality" of a difference, in relation to a given tax, must depend upon the size of the gap which it is supposed to justify.

For several reasons the principle that the substantiality of a difference must be determined in connection with the use to which the difference is sought to be put is more applicable in relation to progressive and graduated taxation than in any other field. *In the first place*, the difference relied upon is likely to be much more measurable than in other situations. When a distinction is drawn between, let us say, a gasoline service station on the one hand, and a grocery store, on the other, the difference between the taxed class and the exempt class may lie in several directions; collection of the tax may be easier from one than from the other; it may be considered by the legislature that one is of such a fundamental and necessary nature that the price of its

products to the consumer should not be raised indirectly by taxation; one enterprise may be considered more desirable than the other; finally, one may be considered a more profitable business than the other, and therefore better able to bear the additional burden. In the face of these and other possible bases for differentiation, a court is properly reluctant to measure the difference and attempt to relate it to the difference in treatment predicated thereon. But where the distinction is attempted to be drawn, let us say, between thirty service stations and thirty-one service stations, most of the possible bases for the proposed differentiation disappear. The only possible differences which may form the basis of a graduated *revenue* measure are those of *increased advantages* and consequent *increased taxable value*. Certainly, the most patent evidence of taxable value in the "store" business is *profitability*. Differences in profitability, when they exist, can be measured, and courts are unfavorably disposed toward taxation measures which bear no conceivable relation in their gradations to the one basic difference between the taxpayers which could plausibly be pointed out as a sound reason for the differentiation. On this ground alone, then, it is clear that a distinction which might be held to justify a variation in a rate of $10 per unit might be held insufficient to justify a variation of $1,000; the first variation might bear a very just relation to the difference in earning power, whereas the second might be so unrelated thereto, factually and demonstrably, as to evidence clearly that the legislature did not create the classification with only this fair ground for classification in mind, and that therefore the difference in rate is arbitrary, capricious, and unreasonably discriminatory. The application of the present tax to one group comprising commodity store chains and systems of multiple service

stations in West Virginia completely ignores relative efficiency, relative advantages, and relative profitability.

In the second place, where a tax is graduated and progressive, with the increasing rates varying in more than arithmetic progression acording to the numerical increase of some characteristic of the taxed subject, another factor is usually present which impels the courts to scrutinize closely the fairness of the statute. That factor is competition. When the subjects of a tax are non-competitve, courts allow the legislature greater latitude in the variations. The reason for this is not far to seek. The immediate effect of an irregular or extreme variation in rates may in such a situation affect the comparative profitability of the several businesses concerned, but in the absence of competition, the more heavily burdened industry will usually be able to pass on the increased expense to its patrons. Where, on the other hand, the several subjects of the tax are in competition with each other, a baseless differentiation has more serious results. It is, in these circumstances, impossible for the more heavily burdened taxpayer to adjust his business to the new conditions. He can, at most, pass on this new expense only to the extent that the "most favored" competitor is taxed. The difference is a direct and unshiftable drain upon the business unit itself. And as pointed out above, a progressive tax scheme, at any rate a business tax of that nature, by its very nature differentiates between competitors, since the characteristic making for the difference in rate of taxation is merely one of difference in degree—in size, number, or some other quantative characteristic.

The relationship of competition to the problem of discrimination has been made the basis of decision in numerous

cases. It was given recognition in a very recent case in the fourth circuit, where in sustaining a statute imposing a tax upon the business of hydro-electric and steam power companies, but exempting companies generating power by internal combustion engines, the court pointed out as one justification for the tax that "current produced by steam power is the great competing factor on the market with current produced by water power." *South Carolina Power Co. v. Tax Comm.*, 52 F. (2d) 515. The same point was noted by this Court in its opinion affirming the decision. *Broad River Power Co. v. Query*, 288 U. S. 178, 179.

In *Milwaukee v. Lee*, 49 F. (2d) 274 (*aff'd*, 284 U. S. 590), an Oregon statute limited to one the number of licensed agents which foreign fire insurance companies could maintain in cities of less than 50,000 population and to two in cities of more than 50,000. For these the license fee was $2 each. It was provided, however, that other agents might be licensed at $500 per year each. A court of three judges enjoined the enforcement of the statute.

It held that foreign insurance companies duly admitted to do business were entitled to the same protection under the Federal Constitution as domestic companies, that the tax was plainly discriminatory, and that the classification was based on no real or substantial difference having a reasonable relation to the subject of the tax. The obvious effect of a tax of this sort was to place the larger insurance offices at a serious disadvantage with respect to their smaller competitors. It was patently untrue that each extra agent actually increased the efficiency of the agency organization to the extent implied by the license taxes imposed. It was an "unreasonable and unconstituional interference" with the right to transact a competitive business.

In *Fiscal Court v. F. & A. Cox Co.*, 132 Ky. 738, 117 S. W. 296, the tax rate upon "each three-horse wagon operated as a business for hauling freight for pay" was $75, whereas the tax upon four-horse wagons of the same nature was $200. The injunction of the collection of the latter tax against the plaintiff was approved, the court saying:

> "* * * the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. *Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper* (*Smith v. City of Louisville*, *9 Ky. Law Rep.* 779), *but the classification sought to be made in this case is manifestly unequal and unreasonable. It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons.* The class of persons whose occupations are taxed are those who run and operate vehicles for hire. The taxing power may subdivide this class, but it cannot unjustly discriminate between the subdivisions so made. As the order in question unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons, it follows that the license fee of $200, imposed upon four-horse wagons, is therefore void." (Italics ours.)
>
> 117 S. W. 298.

The analogy presented by this case is striking. The tax was a progressive one upon mere increase in size. The court recognized that a classification founded upon the size of vehicles or number of horses may be valid, but it held that there was no fair relationship between the supposed advantages of the larger sized vehicles and the extra burden im-

posed by the act in question. When it is said that the tax "unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons," it is clear that the court held that all possible advantages supporting the distinction were insufficient to justify the tax.

Much the same reasoning controlled the decisions in *Grantham v. City of Chickasa* (Okla.) 9 P. (2d) 747; *Hager v. Walker*, 128 Ky. 1, 107 S. W. 254; *People ex rel Moskowitz v. Jenkins*, 202 N. Y. 53, 94 N. E. 1065.

In the case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, MR. JUSTICE BREWER, at pages 111-112, said:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, *we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other.*"

When the inevitable result of a tax is not merely to place one competitor in a less favorable position than another, but actually to decimate or destroy all the profit from a lawful investment, or, in some cases even to cause those engaged in a business to operate at a substantial net loss, and when the competitive situation is such that the taxpayer thus discriminated against cannot adjust his business to absorb the increased burden, the courts recognize that this is not an exercise of a legitimate governmental power, but the arbitrary destruction of business rights, for the benefit of business

competitors, and such a tax must be dealt with as an attempt to violate and destroy the fundamental rights guaranteed in the state and federal Constitutions. *Peterson Baking Co. v. Fremont,* (Nebr.) 228 N. W. 256; *Gillis v. Croft,* 92 Fla. 267, 109 So. 446; *Nafziger Baking Co. v. Salisbury* (Mo.) 48 S. W. (2d) 563; *Riley v. Ayer & Lord Tie Co.,* 147 Miss. 105, 113 So. 214.

It may be inferred from appellant's argument at pages 42-43 of his brief that the levying of an additional tax imposes no actual burdens upon the large distributing companies for the reason that the retail prices are fixed arbitrarily from time to time at their general offices. The reference to the Ashland Refinery Company stipulation (Brief, 43) may suggest that such companies act in c o n c e r t and that there is no real competition between them. The record does not justify such an inference. The Sinclair and Gulf stipulations state that these companies, singly or with other distributors of gasoline, post from time to time the retail prices of gasoline. The names of the other distributors are not given. They may be affiliates or subsidiaries of the Sinclair or Gulf companies. There is no statement in the record to justify the inference, for example, that the Standard Oil Company of New Jersey and the Gulf Company, an organization commonly known to be a vigorous competitor, agree to fix and post a retail price in concert with each other. The Ashland stipulation states that among the larger companies the price is substantially uniform, and that the Ashland company endeavors to conform to such price. Appellee takes no exception to that statement. It is stated in the Standard stipulation that, as a general rule, the retail posted prices of gasoline promulgated by the principal distributors in West

Virginia have been uniform at the same time and place in the several trade areas in the state. (R. 177-178.)

Certainly it is not surprising that there should be substantial uniformity among *competing* oil companies in the retail price of a staple product like gasoline. Sugar, wheat, corn and many other commodities are commonly sold in a given community at a substantially uniform retail price, and yet no one could, or would, suggest that there is not competition as to selling price among large grocery chains handling such commodities, or the products of such commodities.

The stipulation states that the posted price for the appellee's products is determined from time to time at its principal office in New York City, and that there were several changes during the years 1932-1933. (R. 208.) The Court will take judicial notice that wholesale prices of commodities fluctuate from time to time and affect retail prices, and that increased operating expenses and wages, such as the appellee assumed under the National Industrial Recovery program, likewise are reflected in such retail prices. The appellee's requirements are purchased at substantially posted market prices, and changes in the posted retail price of its products reflect open market conditions and any increased operating expenses as well as seasonal trends. Exhibit No. 6, the comparative chart at page 206-A of the record, shows the fluctuations, month by month, in the price of the refined products in the Western Pennsylvania area. The chart shows an upward trend in the wholesale price of refined products in this area from March to September, 1933, and in the retail price of the appellee's products from May to September, 1933, the latter period covering the peak months of motorist consumption. The fair inference in this respect is

that changes in the retail posted price of the appellee's products are controlled largely by wholesale market conditions, both as to supply and demand and prevailing prices, marketing costs and competitive retail prices of other distributors, and that the 1½ cent raise in May, 1933, (which is not shown to have been confined to West Virginia), was occasioned, not by the West Virginia store tax, but by more fundamental conditions within the oil industry, growing out of proration and other factors, and by general changes in price levels judicially known to have been prevalent within the last six months period of the year 1933. But if the distributors of gasoline *could* control the retail price, what could they do about this tax which is imposed at grossly variant rates upon different distributors? Upon what common ground could the various companies meet to adjust their business to this tax, when the five companies with more than 75 stations pay taxes in terms of cents per gallon far in excess of other distributors?

Application of Principles to the Statute

Even a cursory examination of the provisions of the schedule of progression in the rates of taxation reveals unusual features and irregularities and apparent lack of any reasonable or thoughtful legislative purpose. The necessary implication of the schedule is that each new unit in a multiple system from the sixteenth to the twentieth store gives an additional and new advantage of $10 to the system, over and above the advantages previously enjoyed. That is, whereas the tax on the smaller class is $20 per unit, on the larger class it is $30 per unit. As the system grows, that is, in respect to new stores from twenty-one to thirty, it is apparently considered that the cumulative gains over and above

a smaller chain decrease to only $5 for each new unit. But the 31st, 32d, and the next 20 stores, we find, are the bearers of new advantages thirteen times greater for each store than the benefits which accrue from the addition of the ten stores which preceded them. At the 51st store it appears that an unprecedented flood of theretofore untouched advantages accrues; each new store from this point on has all the advantages of the previous ones, and in addition each is presumed to have advantages warranting an additional tax of $100.00. The zenith is reached at the 76th store. There the full beneficent tide of advantages sets in; each unit thereafter added differs from its individual competitor to a degree which the legislature considers may be measured by a money differential in tax rate of $248. A glance at this section of the statute recalls a further pronouncement of this Court in the *Louisville Gas Company* case (277 U. S. 32, 37):

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

The heart of the classification and graduation is the schedule of tax rates. It is the schedule which gives life and substance to the tax scheme. In this case, the classification of the privilege of multiple or chain operation lays the basis for oppression. The steeply graduated schedule of rates completes the work. Even apart from the factual background of the service station business which pays 85.3 per cent of the tax, as collected, the schedule is extraordinary. The sharp and irregular graduations in the schedule indicate the absence of any attempt to classify the privilege of operating various numbers of units, even roughly, according to any rational measurement of the value of the

privilege. In the operation of service stations there is no basis whatever for these unusual and arbitrary rates.

No Factual Differences Between Multiple Stations and Single Stations to Justify Wide Difference in Tax Treatment

In the Analysis of the Record (*ante*) we have referred to numerous facts in the stipulation showing that in the field of service station operation there is an identity of interest among all operators handling the same line of products, whether they operate a single station or many stations. There is no spirit of antagonism like that which exists between the independent grocery store owner and his chain store competitor.

In our brief in the district court we included a *seriatim* discussion of the economic advantages of chain store distribution listed in the opinion in the *Jackson* case. The factors so discussed included "purchasing at quantity discount", "cash discounts", "skill in buying", "warehousing", "abundant capital", "special price policy", "large turnover", "unified advertising", "standard forms of display", "superior management", "special accounting methods", and "standardization of management". The study of the service station business in the stipulation, together with facts of common knowledge, sustain the position of the appellee that to the extent that the foregoing factors exist, they are shared by all service station operators.

At many places in the state, operators of a single station handle the products of several distributing companies. They are called "split-dealers", and, under the appellant's application of the Act, each such dealer is re-

quired to pay $2.50 "store" tax. The volume of business done by many of them exceeds the average sales at the great majority of the stations taxed to the appellee at an average "store" tax of $239.45. The business experience of four such "split dealers" in various parts of the state is given in the record. (R. 193-195.) The Fort Defiance Service Station at Gauley Bridge handles three different brands of motor fuels. During the fiscal year ending February 28, 1933, it sold 73,114 gallons, of which amount approximately 31,728 gallons consisted of appellee's brands. Two of these dealers, Lane's Garage at Belle and J. G. Thumm at Charleston, sold approximately 34,000 gallons of motor fuels in 1932, including appellee's brands. In the same year, 721 out of 948 of appellee's agency stations distributed less than 30,000 gallons of motor fuels, and only 30 sold over 70,000 gallons.

J. A. Blake, operating a single station at Scarbro, had eight gasoline pumps installed at that location, and handled the motor fuels of the Elk Refining Company, American Oil Company, Pure Oil Company, and the Texas Company. His gross sales amounted to $30,611. He would have been required to pay a store tax of $2.50, if the Act had been operative in that year. His distribution of 119,910 gallons of motor fuels in 1932 compares favorably with the best of appellee's company-operated service stations. Only 14 out of 948 agency stations, handling the appellee's motor fuels in 1932, sold more than 100,000 gallons of motor fuels. Of the appellee's 98 company stations, 68 had smaller gross sales in 1932 than did the Blake station. At the beginning of the year 1933, Blake entered into a contract with the Ashland Refining Company for the exclusive sale of its products. According to the tax commissioner's application of

the Act, that single fact serves to impose upon the refining company an average store tax of $133.88, or $131.38 more than the required store tax if Blake had continued to operate his station without such a contract.

One of the examples of directly competitive stations, hereinbefore referred to, aptly illustrates the status of the single station operator in competition with company stations. At Byrd Avenue on the National Road at Wheeling, (Group "H", Photograph Exhibit No. 5; R. 237), the appellee operates a company station. Spears Brothers, Inc. operates a station at the same location handling "Fleet Wing" gasoline. William Price, an agency dealer of the American Oil Company, operates the third station. William Roth, a single station operator, handles the products of the Sun Oil Company at the fourth location. The four stations are pitted against each other to promote the sale of their respective brands of motor fuels and oils. Roth, the dealer in "Blue Sunoco" products, is at no disadvantage whatsoever in meeting the competition of the other three stations (two of which are company-operated, and the third an agency station), because supporting Roth is the whole strength and force of the Sun Oil Company's organization, sales promotion efforts, research, and radio and newspaper advertising. The proof lies in the fact that for the first six months of the year 1933, Roth distributed more gallonage than any of the other stations. The respective gallonage figures for the period are as follows (R. 237):

Station	Gallons Motor Fuel	Average "Store" Tax
Standard Oil Company	60,413	$239.45
American Oil Co. (Agency)	39,431	21.50
Spears Bros. Inc.	66,161	7.28
William Roth	86,986	2.50

Stations similarly situated with respect to size and location can be fairly compared, and upon the assumption that sales of motor fuels, which are the principal source of gross revenue at service stations, are an index of comparable locations, a study has been made of the gross sales and net earnings at the singly-operated Fort Defiance station and at several of the appellee's company-operated and agency stations which sold motor fuels within a range of 5,000 gallons of the Fort Defiance station in the year 1932.

COMPARISON OF SINGLY-OPERATED, AGENCY AND COMPANY-OPERATED STATIONS HANDLING APPELLEE'S PRODUCTS, 1932

Station Location	Motor Fuel Gallonage-Range 68,000-78,000	Total-Gross Revenue	Net Profit
No. 1675—Bluefield	77,440	$18,177.02	$833.00
No. 53—Huntington	70,497	14,901.44	61.00
No. 354—Huntington	75,911	16,599.10	312.00
No. 804—Huntington	70,773	14,868.29	363.00
No. 750—Mt. Hope	78,932	21,500.95	403.00
*H. B. Porterfield, Mullens, agency	73,324	16,920.33	285.96
**Ft. Defiance S. S., Gauley Bridge, individual	73,114	15,834.74	881.57

*The net profit to the agent amounted to $693.20.

**Statement includes only gross revenue from gasoline, oils and grease.

There is not the slightest evidence that the numerous outlets of the appellee and similar companies have in any way hindered the enterprises of the individual dealers. On the contrary, they have the essential facilities of the company-owned stations, without many of the costs of operation. Nevertheless, the tax upon these operators is nominal, while upon the appellee it is destructive. The operating results at the Fort Defiance Service Station, shown in the foregoing table, are illustrative of the fact that the various types of stations operate upon a basis of equality of opportunity for all.

The statement that the owners of multiple stations and of single stations operate on essentially the same economic basis applies equally to the various distributing companies operating the systems of multiple stations. Spears Brothers, Inc. has the advantage of every economic factor with respect to its 8 stations in Wheeling that the appellee enjoys in conducting its stations in the same community. The same is true of the Maynard Stations at Williamson (R. 191-192), and of the companies shown in the groups of competitive stations. (R. 233-238.) Every significant factor in the operation—commodity costs, labor, fuel, equipment costs, etc.—affects all systems in substantially the same way.

It cannot be inferred from the record that there is an absence of competition among distributing companies. There is the keenest competition among them, and every statement of fact in the record points to the conclusion that the single station operators benefit from, and thrive upon, it. Each distributor urges upon dealers handling its products the benefit of its methods to meet this competition. Thus the operators of multiple stations share with their retail competitors the benefits of their experience and resources. The district court characterized the relation of single stations to multiple stations as follows:

> "And the somewhat elaborate stipulation of facts in the case very clearly leads to the conclusion that the combined characteristics which feature the typical chain store system and which have served as a basis for special classification do not inhere in multiple ownership or control of filling stations as compared with individual or independent ownership and operation of a single filling station." (R. 268.)

These considerations compel the conclusion that the extreme divergence in tax treatment accorded the single station operators and the operators of more than 75 stations cannot be said even roughly to conform to the supporting background of facts.

The Sharply-Defined Treatment of Multiple Service Station Operators as Distinguished From Other Forms of Chain Business

Appellant admits that in general the "store" tax undoubtedly "is heavier on service stations than on other chains." (Brief, 33.) His attempted justification is threefold: (a) that the collection of large sums from service station operators is related to the object of the Act to raise revenue (Brief, 47); (b) that the relation of the "store" tax to gross revenue is irrelevant because "gross sales is not the basis of the classification here involved" (Brief, 35); and (c) that the unit measure adopted is the same for all, and therefore it is of no consequence that the Act, in its practical effect, produces inequality between ordinary store chains and multiple service station operators (Brief, 35).

In seeking justification for the application of the Act to ordinary store chains and service station systems, the district court did not confine its attention to the relation of gross revenue and net earnings to number of units. (R. 254-55.) It considered also the less measurable aspects of multiple unit organization. (R. 263.) With respect to gross revenue and net earnings, the district court concluded (R. 254-55):

> "The figures at least warrant the final conclusion that the addition of large numbers of new stations, in excess say of 150 stations, has been accompanied

> by diminishing rather than by increasing returns; that the volume of business of even the very best stations has been on the average less than one-half of the average business done by general commodity stores in their least active units, and that the volume of business on the average of all gas stations over 150 per chain has been so small that little or no profit would have remained after payment of such a tax as that imposed by the state. The net profits of general commodity chain organizations subjected to the tax, are not available, but the ratio of the tax borne by them to their gross revenue, is in no way comparable with the similar ratio in the case of oil company stations, and it is a fair inference that a similar disparity exists as to the ratio of the tax to net earnings of each class of chain organizations."

The inequality here present is sharply defined as to a single type of chain organization. The injustice to service station operators is of major character, and inevitable. It is neither a minor nor incidental injustice.

In its practical operation, the tax is a regressive tax as applied to the taxpayers who pay the bulk of the revenue thereunder. The relation of the "store" tax to gross revenue for the year 1932 brings into bold relief the inherent unreasonableness of the statute when so applied. Any injustice done as between the Kinney Company and Sears, Roebuck (both operators of typical chain stores) is minor in character when it is considered that in each case the "store" tax is a small fraction of 1% of the gross revenue. The tax paid by the Great Atlantic & Pacific Tea Company, the store chain with the largest gross revenue and greatest number of units in the state, is but 1-3 of 1% of its gross revenue. The average for *all* store chains is less than 1-12 of 1% of gross revenue. The "store" taxes paid by all operators of more

than one service station average 3% of their gross revenue. In contrast with the largest chain store, the "store" tax of the appellee, computed on the number of units operated in 1932, is 4.2% of its gross revenue for that year, in the case of the Ashland Refining Company the tax is 4.3% of gross revenue, and in the case of the Gulf Refining Company 7% of its gross revenue.*

In all the chain store tax cases, arising in federal courts, except the *Jackson* (283 U. S. 527) and *Penny Stores* (59 F. (2d) 789) cases, the statute under which the tax was levied expressly excluded filling stations. In the two cases named, no operator of multiple service stations was a party to the complaint. The federal courts have recognized that a substantial difference exists between stores and service stations, but have never had occasion to test the validity of this type of legislation, as applied to the latter type of business.

Two federal decisions have distinguished the application of chain store tax statutes to typical store chains and to service station systems. *Southern Grocery Stores v. Tax Commission, supra*; *Liggett v. Lee, supra.* In the *Liggett* case this Court pointed out that the true *ratio decidendi* of the *Jackson* decision is not based "upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the ev-

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*The gross revenue figure of the service station operators is based on the price of motor fuels to the motorist, which includes the state gallonage tax. If this were not done, the percentage of tax to gross revenue would be greatly increased. In the case of the appellee, this figure is $6,319,012. The appellant states (Brief, 36) that the tax is but 2.87% of appellee's gross revenue. Appellant arrives at this somewhat smaller percentage by using $8,381,195.48 as the amount of gross revenue ($10,198,453.32 less the $1,817,257.84 gallonage taxes paid in 1932). This figure includes gross revenue from other than taxable units in the state. As the tax is imposed upon "stores" in the state and nothing else, the district court used the revenue from the marketing units ($6,319,012 adjusted by the court to include tires, etc. sold at agency stations, R. 278).

idence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually-operated small store." The fact that the Court viewed the tax in this broad way lends peculiar significance to its approval of the exclusion of filling stations from the tax scheme. In the case of typical commodity chains, the Court found exclusive advantages in chain organization, management, merchandising methods, and type of business sufficient to justify the legislative classification imposing a higher tax on stores which are part of a larger system. But whatever the situation may be in a typical commodity chain, the general conduct and methods of service stations do not vary substantially whether they are members of a chain or individually-operated outlets. The absence of this ultimate fact of distinction in the service station business was recognized by this district court and went far to control its decree.

Legislative Declaration Can Not Make an Arbitrary Classification and Graduation Valid

As we read the tax commissioner's answer, it is his position that the present situation was deliberately and designedly brought about. From paragraphs XIV (d) and XV (b) we understand his position to be that it is a matter of no importance that the tax bears no relation to the ability of the taxpayer to pay, to his income or earnings, to his receipts or losses, or that it is in no way proportioned to capital or value. The justification for the exaction in his mind is that the tax is reasonably proportioned to the "opportunity to engage in the store business." Possibly a tax of this kind will be *prima facie* presumed to be in proportion to the value of the opportunity or privilege of doing

the thing which is taxed, but the mere statement of the presumption does not amount to absolute justification or proof.

> " 'It is apparent,' this court said in the Bailey case, 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by a direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' "
> *Heiner v. Donnan*, 285 U. S. 312, 329.

The legislative power to tax and the presumption of constitutionality are insufficient support for a tax laid upon such a loosely conceived privilege as the operation of "stores". Excessive and burdensome rates of taxation upon "stores" are unwarranted. How large is a "store"? What are the gross or net earnings of a "store"? What investment is required to create a "store"? What is the turnover of a "store"? If these questions appear absurd, what of the assumption relied upon by the appellant that the legislature may lay taxes in any amount upon an assumed taxable subject the name of which connotes absolutely no factor indicative of taxable qualities or values? It is one thing to hold, as this Court did in the *Jackson* case, that the addition of any "store", however small and of whatever character, may be the subject of a nominal privilege tax, but it is quite a different matter to contend that the same uncertain and assumed conception may be used as the basis for a tax sufficient in size to destroy the systems of service station operation which have been made the principal subjects of this tax. Taxes cannot be laid in so reckless a fashion.

"Some relation" between the tax and the *value* of the privilege subjected thereto is requisite to any such tax. *Airway Appliance Co. v. Day*, 266 U. S. 71.

It has been held that a "lot" is not a proper standard of taxation. "The very term taxation, whether used in the Constitution or elsewhere, signifies a proportioned charge, upon some uniform standard, either of value or something else, which will afford a means of comparison." *Woodbridge v. Detroit,* 8 Mich. 274, 293. A tax is not proportioned if it increases according to numbers of "lots" or "stores", it being obvious that such units may embrace grossly unequal "lots" or "stores". It is clear that the "store" unit of taxation is not adapted to high rates.

Merely abstract conceptions of a privilege can not measure the reasonableness of the tax. Constitutional principles do not operate *in vacuo.* The "mere fact of classification" does not save the enactment from constitutional inhibitions. It must be based upon "some reasonable grounds". *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* 165 U. S. 150. In determining the validity of a classified tax, the groundwork of facts is controlling. This is a practical rule, indicating that a tax classification must bear some reasonable relation to some taxable quality, and it is the direct antithesis of the statement in the answer that to justify the tax the court need look no further, once it determines that the taxpayer is taking advantage of the opportunity of engaging in the "store business".

Arbitrary exactions in the guise of taxes find no support in any judicial statement sustaining legislative discretion, but violate the principle that classification for tax purposes must rest upon some reasonable difference having a fair and substantial relation to the object of the legislation. *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389.

It was said in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237, that in the matter of imposing taxes, selecting the subjects of taxation, and varying the rates, the legislative discretion is broad so long as it proceeds within reasonable limits. The possible reasonableness of a given classification for purposes of taxation being conceded, the differences in rates predicated upon the classification must be related to the degree of difference in situation which is the measure of taxable value. *Louisville Gas & Elec. Co. v. Coleman*, and *Fiscal Court v. Cox, supra.* In the *Jackson* case, MR. JUSTICE ROBERTS prefaced his opinion and discussion with the statement that the state sought to justify the measure only under the power of the legislature in prescribing an occupation tax, to classify business, "so long as its action is not unreasonable and arbitrary." No contention was made in that case, and none can be properly made that the legislative authority with respect to classification and rate schedules is without limits. "With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis." *Ohio Oil Company v. Conway*, 281 U. S. 146, 160. In his dissenting opinion in the *Liggett* case, MR. JUSTICE CARDOZO expressed disagreement with the majority opinion establishing the invalidity of the county line classification, on the ground that the theory of the statute seemed to him to satisfy the "rough and ready form of justice" required in chain store taxation. But in the same dissent he also stated that such legislation must not "go so far as to outrun the bounds of reason." No fact exists which warrants the view that the "bounds of reason" were observed in the fashioning of the tax here involved.

C. THE APPELLANT'S APPLICATION OF THE ACT PRODUCES A DISCRIMINATION SO ARBITRARY AND CAPRICIOUS AS TO AMOUNT TO THE CONFISCATION OF THE APPELLEE'S PROPERTY AND BUSINESS WITHOUT DUE PROCESS OF LAW.

Appellant's statement of the federal questions involved (Brief, 16) indicates a misconception of the exact significance which appellee attaches to the "confiscation" of its earnings which the tax brings about. We do not contend that such "confiscation" presents a separable and distinct constitutional issue. This Court has said that a *federal* statute passed under the taxing power may be "so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment" (*Tyler v. United States*, 281 U. S. 497), and by like reasoning we see no reason why a *state* statute may not fall before the similar clause of the Fourteenth Amendment.

It is manifest that the principal taxpayers under existing conditions or any conditions which reasonably may be anticipated, can not long operate systems of stations which by no possible means can earn the license tax. The district court summarized the effect of the tax upon the appellee as follows (R. 270-71):

> "The application of the Act to the plaintiff becomes exceedingly onerous. There is force in the plaintiff's contention that it practically confiscates the value of the plaintiff's property by absorbing under the form of a license tax for privilege to do the business, the whole net profits of the business, and this not by virtue of faulty or inefficient management but from the very nature of the business itself.
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> * * *

> "The possible volume of business for most of these stations is necessarily limited in amount. It is therefore natural to find, as is shown by the stipulation of facts, that the average net profit per station does not exceed a few hundred dollars a year and yet this tax as applied to the Standard Oil Company, the plaintiff in this case, requires the payment of a license tax of about $240 per station, thus exceeding the annual net profits of the whole business. The result will be obvious—either the abandonment of the stations, thus resulting in a detriment to the public and incidentally a cessation of the revenue, or some entire re-organization of the business which may be less convenient to the public." (To like effect, see SOPER, R. 265.)

The case of *Towne v. McElligott*, 274 Fed. 960 (D. C. S. D. N. Y.) contains a statement which is expressive of appellee's position in this connection. The plaintiff there contended that the federal war-time income tax was so high as to amount to confiscation under the Fifth Amendment. In disposing of this contention JUDGE LEARNED HAND said:

> "The term 'confiscatory', when so used, is clearly one of degree, because literally all taxes are pro tanto confiscatory. Except as it imports some inequality of burden, not here suggested, it can mean nothing but that there is a measure to the amount which the government may seize in taxes for its own purposes. The plaintiff relies on certain language in Brushaber v. Union Pac. Ry., 240 U. S. 1, 24, 25, 36 Sup. Ct. 236, 60 L. ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713, which broken from its context, he thinks helps his contention. *The meaning of that language is only that there may be inequalities in the rates of levy great enough to become a confiscation of the income which suffered the highest rates.*" (Italics ours.)

The basic principle upon which appellee stands is inequality, discrimination against certain taxpayers and in favor of others. "Confiscation", as the term is here used, expresses realistically the oppression which flows from that discrimination.

D. HOUSE BILL NO. 112 HAS NO APPLICATION TO THE SERVICE STATIONS AND BULK PLANTS OF THE APPELLEE.

The district court not only passed upon the federal constitutional question raised by the appellee, but also held, as a matter of construction, that the statute does not apply to gasoline service stations and bulk plants. In so doing, the court acted upon the settled principle that the presentation of a substantial federal question for adjudication empowered it to determine all questions raised, whether of federal or state law, irrespective of the disposition of the federal question. (R. 249-250.) The correctness of this jurisdictional principle is expressly recognized by the appellant. (Brief, 51.)

The alleged liability of the appellee for the payment of a license tax under the Act rests wholly upon the *interpretation and rulings of the tax commissioner* that the terms "stores" and "mercantile establishments", as used in the statute, include the 101 service stations owned and operated by the appellee, the 388 leased outlets and 460 vending privilege outlets operated pursuant to agency agreements, and the 54 bulk plants used in the distribution of its petroleum products. Appellee contended below that the Act, properly construed, does not include service stations and bulk plants, and the district court sustained this contention. (R. 265-276.) The appellant, in his brief, disregards many of

the reasons assigned, but mentions prominently the argument that the words "mercantile establishment", used in section 8 of the Act could not extend the scope of the statute beyond the meaning of the word "stores" used in the title. This argument was made below merely as preliminary to the comprehensive consideration of the question of construction presented. The point, however, may be restated briefly.

1. The Act Designates "Stores" as the Subjects of the License Tax.

In several states the titles of similar acts refer expressly to both "stores" and "mercantile establishments" (Louisiana Acts 1932, No. 19, p. 125; South Carolina Acts 1930, No. 829, p. 1384); the title of the West Virginia statute recites that it is "an act requiring licenses for the operation, maintenance, opening, or establishment of *stores* in the state." Section 1 provides that it shall be unlawful to "operate, maintain, open or establish any *store*," etc. Section 2 provides for the procuring of licenses by those desiring "to operate, maintain, open or establish a '*store*' in the state." Except in the definitive section (section 8) and in section 5, which contains the schedule of license fees, the word "stores" appears throughout the Act without any limitation or additional wording. The particularity and directness with which "stores" are specified in the title and in the enacting sections of the statute show a fixed intent and object to exact a license tax from the class of establishments which is included in that term.

An act must embrace but one object, and that must be expressed in the title. Statutory provisions can not proceed beyond the single object so expressed. If it be considered, therefore, that the words "mercantile establishment"

in section 8 enlarge upon the language of the title, this could only have the effect of rendering void the offending section to that extent. CONSTITUTION OF WEST VIRGINIA, art. VI, s. 30. The Supreme Court of Appeals of West Virginia has consistently enforced this constitutional rule, quoted in appellant's brief, and within recent months has stricken down important provisions of at least three legislative measures on the ground that they transcended the purposes announced in their respective titles. A title "need not descend to particulars, but it must be broad enough to give a fair and reasonable index to all the purposes of the Act." *Boggess v. Johnson,* 113 W. Va. 193, 167 S. E. 82. A statute may contain many parts germané to the title, but any provision which cannot be traced to the title is void *in toto*. *Moats v. Cook,* 113 W. Va. 151, 167 S. E. 137.

Section 8 of the statute (R. 40) states that:

> "The term 'store' as used in this act shall be construed to mean and include *any store or stores or any mercantile establishment or establishments* which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale." (Italics ours.)

Under proper rules of construction the only tenable interpretation of the above provision is that the legislation is not directed against all buying and selling of merchandise which may be carried on in divers ways and in divers places in the state, but only against the particular places of business which are denominated "stores". The expression "mercantile establishment" adds no new place of business or classes of business to those commonly embraced

in the specific word "stores", but embraces only such places as are included within that term. The word "stores" has a well known limited and restricted meaning, in popular acceptation, and, where a term of such specific and definite import is employed in a statute, the doctrine of *ejusdem generis* requires that general words which follow should be held to include only such things as are within the compass of the preceding definite expression. 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, (2d ed.) pp. 814-15; *Gates & Son v. City of Richmond,* 103 Va. 702, 49 S. E. 865.

The case of *Leonhart v. Board of Education* (W. Va. 1934) 170 S. E. 418, 420, cited by the appellant, contributes nothing new to this discussion. It restates the general principle laid down in the *Boggess* case, *supra.* It does not answer the ultimate question here. If the term "mercantile establishment", as used in the body of the Act, does not fall within the doctrine of *ejusdem generis,* and if it extends the scope of the Act to places of business not already included within the popular and statutory concept of the word "stores", then the use of the term is something more than a mere particularization and the title must give notice of the fact.

From the definite manner in which the Act is directed against the operation of "stores", it is plain that the incidental and subsequent use of the expression "mercantile establishment" adds nothing to its provisions. The appellant finally qualifies his position on the point, saying that whether or not the use of the words "mercantile establishment" has the effect of making more comprehensive the

meaning of the word "stores", the title reference to "stores" sufficiently meets the constitutional requirement to sustain the interpretation that gasoline service stations and bulk plants fall within the operation of the Act. (Brief, 53.)

2. The Legislature Used the Word "Stores" in Its Ordinary, Popular Signification, Which Does Not Include "Service Stations" and "Bulk Plants."

The appellant correctly states (Brief, 53) that there are but two cases, other than the case at bar, which pass upon the applicability of chain store legislation to gasoline service stations and bulk plants. *Wadhams Oil Co. v. State*, 210 Wis. 448, 245 N. W. 646, *on rehearing*, 210 Wis. 457, 246 N. W. 687, and *Midwestern Petroleum Corp. v. State Board of Tax Com'rs* (Ind. 1933) 187 N. E. 882, *rehearing denied*, 191 N. E. 153.

The appellant advances the identical argument which was rejected in the *Wadhams* case (246 N. W. 687, 688), but which was approved in the *Midwestern Petroleum* case. Relying on a certain dictionary definition that a "store" is "*any place* where goods are kept for sale, whether by wholesale or retail; a shop," the appellant reasons that gasoline and motor oils are "merchandise" (appellee has never contended otherwise), and that service stations and bulk plants are "places" where such merchandise are sold.

Appellant looks primarily to the dictionary, though he ignores the portion of the definition which makes "stores" synonymous with "shop". We look primarily to the language of the Act itself to determine its applicability to service stations and bulk plants. The defi-

nition of the word "store" in the Act is not the dictionary definition. The legislature deliberately used language in section 8 which assigns to the word its ordinary, popular meaning. The term "store", it said, shall be construed to mean and include *"any store or stores or any mercantile establishment or establishments"*. As already noted, the incidental descriptive use of the expression "mercantile establishment" does not and can not extend the definition of "store", or enlarge the operation of the Act.

Having this statutory definition in mind, the district court said (R. 265-6):

> "Does the definition of a 'store' in the Act cover the gasoline 'filling' or 'service' stations conducted by the plaintiff and described in the stipulation? It is unnecessary to repeat the description in any detail as it is a familiar city or roadside spectacle well known to all at this time. Under a substantially similar statute it has very recently been decided in Indiana (Midwestern Petroleum Corp. v. State Board, Ind. Supreme Co. Dec. 15, 1933) in the affirmative; while in a very fully considered opinion (adhered to on rehearing) it has been decided in the negative in Wisconsin (Wadhams Oil Co. v. Wisconsin, 245 N. W. 646, 246 N. W. 687). In the former case the decision is based almost entirely on the ground that the word 'store' in its dictionary sense is literally broad enough to cover the typical gasoline or service station because it comprehends a place where gasoline or similar automobile necessities, articles of merchandise, are sold at retail. In the latter case there was applied the well known principle of statutory construction that 'as a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it appears from the context or otherwise that they were used in a different sense.' 2 Lewis' Sutherland Statutory

> Construction (2d Ed.) sec. 390; Old Colony R. R. v. Commissioner, 284 U. S. 552, 560. It was correctly said by the Wisconsin Court that 'in common language a filling station is not referred to as a store, or a mercantile establishment where goods, wares or merchandise are sold or offered for sale at retail.' A comparison of the reasoning in the two opinions leads us to the conclusion that the sounder rule as applied to this case is that adopted by the Wisconsin Court. The dictionary definition of 'store' is clearly too broad to be here controlling."

The Supreme Court of Wisconsin, through CHIEF JUSTICE ROSENBERRY, in the *Wadhams* case, *supra*, emphasizes the point which appellee makes here, that legislative language must be so read as to accord to it a natural rather than an artificial meaning. The opinion is in part as follows:

> "If one were to stop five hundred well-informed intelligent persons traveling into any city and ask them to stop at the first store or mercantile establishment where goods, wares, or merchandise were sold or offered for sale, it is quite probable that not a single one would stop at a filling station or service station such as is described in the plaintiff's complaint. This distinction which exists in the minds of the great mass of people in the use of these terms must have been present in the mind of the legislature when the act was passed. Had the legislature intended to include such establishments as are described in the complaint, it would have used appropriate language for that purpose. We therefore conclude that establishments of the kind described in the complaint are not within the terms of the act and that the plaintiff is entitled to recover the moneys paid under the act." (Italics ours.) (245 N. W. 646, 649.)

Appellant questions the accuracy of the observation by CHIEF JUSTICE ROSENBERRY in the above quotation concerning "five hundred well informed intelligent persons." Against this, he pits the comment of the Indiana court, that, if five hundred such persons were asked for a definition of the word "store", they would give substantially the dictionary definition. (Brief, 58-9). Taken together, the respective comments of the Wisconsin and Indiana courts merely illustrate the difficulties inherent in the use of language, and show that the word "store" *has* in fact a more limited meaning in ordinary discourse than is assigned to it by the lexicographer.

While admitting that the places of business, at which petroleum products are sold, are referred to as "service stations", the appellant charges in paragraph XII of his answer (R. 89-90) that the expression is not exclusive of the more general term "stores". He illustrates his assertion there by a comparison with "lumber yards" and "plumbing shops", which he avers, are within the broad meaning of the word "stores". Presumably he might have added "stock yards", "junk yards", "coal yards", "dairies" and a great many other such places, none of which, we think, come within the popular understanding of "stores". Indeed, this argument is merely a particularization of the more general proposition that, from the viewpoint of the lexicographer, perhaps all places where commodities are housed for storage or sale are "stores" in a literal sense. That viewpoint does not govern this case.

Nor do other lexicographers extend the term "stores" to the full limit indicated by the definition quoted from Webster. The Standard Dictionary defines the word thus: "A

place where merchandise of any kind is kept for sale; a shop; as, a grocery store; a wholesale-store." The Oxford Dictionary gives the definition, "A place where merchandise is kept for sale," and it explains that the term was early used in the United States and some British colonies to denote a large-scale shop, dealing in a great variety of articles, but that today in these countries it is the usual equivalent for "shop". It is correct to say that a store is a place where merchandise is kept for sale, but it is not true that *all places* where merchandise is so kept are "stores", as the word is commonly understood.

The meaning of a word is not rigid and unchanging for all time. Conceivably, at some future time people may come to use the word "store" to refer to businesses of the type conducted by appellee, but the controlling proposition is that the word had a definite popular signification at the time it was incorporated into the Act, and that signification did not, and does not, embrace "filling stations" or "service stations".

Abstract definitions of words cannot control their meaning in a particular context. The prevailing principle of construction is that the words of a statute are to be taken in their ordinary, popular sense. We may be certain that this principle reaches the legislative intent, recorded in the Act itself, to assign to the word "store" the same limited meaning which it has in every day conversation to designate certain ordinary places of business, usually an enclosed room in a building, where common articles of trade and commerce are offered for sale. In common speech the word has a definite range of meaning, and no one refers to a service station or bulk plant as a "store". In all probability no one ever referred to a filling station as a "gasoline store."

In denying a motion for rehearing in the *Wadhams* case, *supra*, the Wisconsin court reiterated and elaborated its reasoning as follows:

> "There is no difficulty in discovering the intent of the legislature. * * * The legislature intended to require a license fee from every person, firm, corporation, or association engaged in the chain store business. Section 5 (1) defines what in the mind of the legislature amounted to a chain store as follows: 'Every person, firm, corporation, or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more stores or mercantile establishments where goods, wares or merchandise are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business.'
>
> "The question is not what the legislature intended, but what did it mean when it used the language quoted. If the legislature had intended to be all-inclusive, other appropriate language might have been used. In the definition, it might have said, instead of a store or mercantile establishment 'a place', and inserted after the word 'merchandise' the words 'of any kind', and phrased the statute as follows: 'Every person, firm, corporation or association engaged in the business of operating or maintaining in this state under the same general management, supervision and ownership two or more places where goods, wares or merchandise of any kind are sold or offered for sale at retail shall for the purposes of this section be deemed to be engaged in the chain store business.'
>
> "So phrased, the statute would have included filling stations and many other establishments not within the terms of the act as we shall see.

"The case is argued here as if the court had invented some rule of construction. The legislature itself has established rules for the construction of statutes (chapter 370). The first rule laid down, section 370.01 (1) is as follows: 'All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.'

"There are many places where goods, wares and merchandise of some kind are kept for sale which would not be understood, according to the common and approved usage of the language, to be stores or mercantile establishments. Among these might be enumerated tailor shops, shoe shining parlors, wood yards, lumber yards, brick yards, stone quarries, news stands, fruit stands, flower stands, cheese factories, restaurants, hotels and no doubt others. On many farms farm produce is kept for sale at retail and many small manufacturers maintain retail dedepartments as part of their business. The same argument which supports the conclusion reached in the brief that a gasoline filling station is a store would support the conclusion that a brick yard is a store. It is a place where goods, wares, and merchandise are kept for sale at retail. No one could reasonably argue that the legislature used the term 'store or mercantile establishment' on any such wide, comprehensive and unrestricted sense. No one has yet pointed out that according to the common and approved usage of the language the term 'store' or 'mercantile establishment' has ever been applied to a gasoline filling station. In thus interpreting the language of the statute, we follow the command of the legislature. This statutory provision with respect to construction merely adopts the rule universally applied by courts." (246 N. W. 687, 688).

Appellant, looking to the supposititious definition of the word "store" which the Wisconsin court suggests would be inclusive of filling stations, calls attention to the words "goods, wares, or merchandise of *any kind*" which appear in the West Virginia statute, and argues that it is not unlikely the Wisconsin court would have held filling stations within the terms of such an act. (Brief, 62.) A fair reading of the foregoing quotation shows unmistakably that the suggested changes were not made in the alternative and that the fundamental change suggested as necessary to bring service stations within the statute was the substitution of the word "place" for the expression "store or mercantile establishment."

The following authorities evidence a strong tendency on the part of courts to assign a meaning to the words of a statute or ordinance according to their ordinary, popular acceptation, where such meaning differs from that found in dictionaries. In *City and County of San Francisco v. Larsen*, 165 Cal. 179, 131 Pac. 366, it was charged that defendant, a restaurant keeper, was within an ordinance imposing a license tax on any person who "at any fixed place of business, sells or manufactures goods, wares or merchandise." The court found that, although literally he was engaged in the business of manufacturing goods, and although technically there was a sale of food so manufactured, yet—

> "We must look to the phrase as a whole, consider its object and purpose, and *give it a meaning according to the ordinary acceptation of the words used.* When we speak of a place where the businesses of selling or manufacturing goods, wares, or merchandise is carried on, we do not usually think of restaurants in that connection * * * A restaurant keeper is not, according to ordinary usage, either a mer-

> chant or a manufacturer. * * * We are of the opinion that this phrase in the Charter was used in its ordinary acceptation to describe what is usually understood by the words when used in that collocation and that, when so understood, the business of selling or manufacturing goods, wares, or merchandise does not include the business of keeping a hotel or restaurant." (Italics ours.)

Likewise, in *State v. Hanchette*, 88 Kan. 864, 129 Pac. 1184, the court held that the sale of hydrogen peroxide at a ten cent store was not a violation of an act forbidding the sale of medicines except by registered pharmacists.

> "From all the evidence in this case it appears that this preparation falls in the class of witch hazel, Pond's Extract, vaseline, and many other like household remedies which in the technical sense of the physician have curative, alleviative, and pleasant effects from their application, and hence are called medicines, but *in the common use of the language are not so designated.*" (Italics ours.)

That the principle applies particularly in the interpretation of tax laws was held in *Evening Journal Ass'n v. State Board of Assessors*, 47 N. J. L. 36, 54 Am. Rep. 114, where the court said:

> "The interpretation of words in their popular sense rather than according to their scientific meaning is peculiarly required in the construction of tax laws. * * * *In the construction of such laws the courts will incline strongly toward the popular signification of language.* * * * It is true that in the production of his newspaper, which he sells, he employs manual labor and mechanical skill * * * In the ordinary and general use of the word 'manufacturer', the publishing of a newspaper does not come within the popular meaning of the term." (Italics ours.)

The same view has been expressed with reference to the word "store". In *State v. Wilson*, 47 N. H. 101, 104, the court said:

> "It is the popular name and designation and not the general character and use of the building which must govern the interpretation of the law. * * * But they designated the buildings meant by their appropriate names, and no building not denominated a warehouse or granary as its proper and distinctive name, can be construed to be a warehouse or a granary within the meaning of the statute * * *
>
> "*But if we were to follow the definitions found in the dictionaries, it would be easy to show that a granary is a warehouse and a store is a warehouse, and vice-versa* * * * *Tracing the meaning of the words used in the statute through these definitions, the term store alone would be sufficient to cover all the buildings named in this clause of the statute, and many more* * * * Why, then, is not a granary a warehouse or store within the meaning of the statute? Simply because a warehouse is not the popular name of a building such as is usually devoted to the storage of corn and grain; and therefore, to bring granaries within the statute, it was necessary to add them to the former list." (Italics ours.)

Appellant purports to recognize the principle of construction, quoted by the district court from LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, that words of a statute are to be taken in their ordinary, popular sense. But nowhere does that treatise indicate that dictionaries are the final arbiters of the meaning ascribed by the legislature to the words of a statute. The proper rôle of the dictionary in the process of statutory construction is well stated by the following authority:

"Dictionaries, both legal, scientific, and general, may be consulted by the courts, in proper cases, in the construction of a statute. It is indeed quite customary for judicial tribunals to turn to the standard lexicons for aid in determining the meaning to be assigned to words of common speech or to technical terms. They do not recognize these works as binding authorities, which they are imperatively required to follow, but consider their definitions as persuasive evidence in support of the conclusions which they are induced, on other and more weighty considerations, to adopt. * * * 'the best dictionary is but a guide to the true meaning of a word in a particular context, and can never be an absolute authority on so varied and fluctuating a subject as language. It facilitates the comparison of the different meanings of a word, and aids the memory of the person in search of the particular meaning, but can rarely anticipate the exact color which will be given to any word or phrase by the context in which it is set.' And 'no meaning of a word which has received a construction, by law or uniform custom, can be adopted from the dictionaries in conflict with that construction. And where a word is reconcilable with law or established custom in the particular manner in which it is used, a different meaning cannot be given to it upon the authority of a lexicographer.'"

BLACK, INTERPRETATION OF LAWS (1896) pp. 198-199.

The Indiana court in the *Midwestern Petroleum* case, *supra,* upon which appellant relies, rewrote and revised the familiar principle of construction by inserting the word "dictionary" as follows:

"It should be accepted as the rule that non-technical words used in the title of an act, or in the act itself will be construed according to their ordin-

> ary and accepted *dictionary* meaning, unless an intention to convey some other or different meaning can be gathered from the context." (Italics ours.)

This newly-fashioned principle makes the dictionary practically a binding authority, and was the basis of the Indiana court's ruling in that very case. In this we think that court was led astray. Notwithstanding Webster's definition that a "store" is "*any place* where goods are kept for sale," and the more limited definition in the Indiana statute that a "store" is a "*store or mercantile establishment* in which goods, wares or merchandise * * * are sold," the court undertook to state that "the definition of the word 'store' contained in the body of the act conforms almost exactly to the dictionary meaning, thus indicating the legislative understanding of that word." After the decision in the case at bar, the Indiana court denied a rehearing in the *Midwestern Petroleum* case (191 N. E. 153). The dissenting opinion filed by JUDGE MYERS is a forceful statement of the error into which the majority fell in construing the statute.

> "To my way of thinking, the sole question in this case, under the facts pleaded, is whether appellant is without the legislative definition of the word 'store.' *The majority opinion has chosen to give the word 'store,' as used in the act, its dictionary definition instead of the limited meaning given to it by the legislature.* The title of the act relating to stores is general, but in the act it is specific. In such cases, in the construction of statutes, a specific provision will prevail over a general provision involving the same subject matter. * * * the legislature was not content to use the broad dictionary definition when defining 'store' in what is commonly known as the Chain Store Act, * * *. The dictionary definition includes the words 'any place,' which might well be

construed as applying to peanut pushcarts and street corner venders, for they are at a place when the sale is made, while the word 'store' in the so-called Chain Store Act is construed to mean any store in which goods, wares or merchandise of any kind are sold either at retail or wholesale.

"It is said, if the legislature intended to exclude filling stations along the roadside or bulk stations, it would have said so, but, on the other hand, it may as well be said that, if it was the legislative intention to include roadside filling stations and bulk stations, without naming them, the legislature would have said a store is 'any place where goods are kept for sale,' thus indicating an intention to adopt the dictionary definition. * * *

"In my opinion the identical question for our decision was considered and decided adversely to the majority opinion in this case by a three-judge United States District Court for the Southern District of West Virginia. Standard Oil Co. of New Jersey v. Fox, Tax Commissioner, 6 F. Supp. 494. The opinion in that case, in my judgment, rests upon sound legal principles, and I am persuaded to adopt it as controlling of the case at bar." (191 N. E. 153, 154.) (Italics ours.)

The appellant says that reason, lexicology and precedent are favorable to his view. We have shown that lexicology does not always accord with the popular meaning of words. As to the factor of precedent, appellant, at pages 54-65 of his brief, discusses some thirteen cases, and concludes with the statement that—

"Under ordinary dictionary definitions, which all of the courts in the other cases, other than the Wisconsin court, have recognized as the popular and common understanding meaning of the word 'stores', the meaning of that word as used in the sta-

> tute in question should be clear without the necessity of resorting to extrinsic evidence."

The authorities cited by appellant are an insufficient foundation for this statement. Aside from the *Midwestern Petroleum* case, *supra*, in only three of the cases cited do the courts refer at all to dictionary definitions of words (*Gunther v. Atlantic Refining Co.*, 277 Pa. 289, 121 Atl. 53; *Charleston Oil Co. v. Poulnot*, 143 S. C. 283, 141 S. E. 454; *Viquesney v. Kansas City*, 305 Mo. 488, 266 S. W. 700), and of these three, only in the *Gunther* case was the court dealing with the word "store".

This miscellaneous collection of cases discusses restrictive covenants in deeds, variously phrased types of statutes, and ordinances. There is considered the meaning of such words and phrases as "store", "merchant", "merchandise", and "mercantile purpose". The businesses involved include filling stations, public garages, automobile accessory stores, and the retail sale of goods on a plantation. Many of these cases are irrelevant because there is no contention here that gasoline and other petroleum products are not "goods, wares or merchandise of any kind."

The cases of *Mellitz v. Sunfeld Co.*, 103 Conn. 177, 129 Atl. 228, and *Abbott v. Steigman*, 263 Mass. 585, 161 N. E. 596, are of the same general type as the *Gunther* case, *supra*, in that they involve restrictive covenants in deeds. In the *Gunther* case, for example, the court held with reference to the erection of a service station:

> "That such use was for the purpose of trading and came within the designation of a store *within the meaning of a clause restricting the premises to residential purposes* can hardly be doubted." (Italics ours.)

Where the court is confronted with the necessity of distinguishing between business and residential uses, there can be no doubt that the operation of a filling station is a non-residential use. The controlling considerations in such cases are far different from those which control statutory construction. Where the terms "mercantile" and "store" are used in their ordinary acceptation to differentiate one type of business from others, the building restriction decisions are of no value as precedents.

The ordinance in *City of Troy v. Harris*, 102 Mo. App. 51, 76 S. W. 662, contained the following broad provision: "Every person who shall deal in the selling of goods, wares and merchandise *at any store, stand or place* * * * shall be considered a merchant and take out license therefor." The inapplicability of this decision to the case at bar seems obvious. Likewise, in the case of *Craig v. Pattison*, 74 Miss. 881, 21 So. 756, no reference was made to a dictionary, nor was it necessary because it appears from the opinion that the statute itself employed the broad definition that a "store" is "*a place* where goods are sold."

We admit the proposition laid down in *Buchanan v. Louisville Coal & Coke Co.*, 98 W. Va. 470, 127 S. E. 335, which is discussed at page 60 of appellant's brief. If a statute assigns a "definite meaning" to a word, resort to extrinsic evidence *is* unnecessary. The very point at issue here is whether the legislature has assigned to the word "store" the so-called dictionary meaning or the popular signification of the word.

There are substantial *reasons* why the public mind has not included gasoline service stations or filling stations in the

general term "stores". One reason is the character of the station itself.

The appearance and physical attributes of a service station are so different from those of a store as to completely justify the distinction in popular appellation. A typical service station consists of a parcel of land, upon which there has been laid a concrete surface. A small building, usually not larger than twenty feet square, is constructed thereon, chiefly for office use and for the convenience and comfort of the employees. Somewhere upon the concrete surface there are installed most prominently the upright pumps for refueling motor vehicles, also an automatic lift or a pit for the greasing and oiling of such vehicles, two or more underground tanks for the storage of gasoline, an air compressor and air connections for the inflation of tires, oil and grease tanks, water services, and incidental apparatus for the greasing and oiling of cars and the repair of tires. The concrete surface is divided into runways so that the operators of vehicles can drive up to the pumps or pits. (R. 10-15, 80-81, 152.)

While these physical differences go far to distinguish a service station from the popular mental picture of a "store", they are also pertinent to a proper understanding of the very language of the statute. Section 8 defines a "store" as a "store" or "mercantile establishment" *in which* goods, wares or merchandise are sold. The licensee is required to display his license in a conspicuous place *in* the store. There is nothing ambiguous or uncertain about the meaning of the word "in" or the expression "in which". These terms are not synonymous with "at", "near", "about", or "outside", yet the record shows, and it is judicially known, that gaso-

line furnished at a service station is not sold *in* any "store." We do not urge in this connection that this case should turn upon the difference between the word *"in"* and some other term which might have described more exactly the conditions at a service station. The point goes only to this: It appears from the use of the word "in" and the expression "in which" in connection with "stores" that *the legislature had in mind the same kind of establishment that comes to the mind of the average person when he uses or hears the word "store" in ordinary conversation.*

In this particular the West Virginia statute is even clearer than the Wisconsin act. The latter defines "stores" as "two or more stores or mercantile establishments *where* goods, wares, or merchandise are sold." If a filling station, which transacts its business at the automobile of the customer, is not a *store where* goods are sold, *a fortiori,* it is not a *store in which* goods are sold.

The language of the Act here in question may profitably be compared with that employed by the legislature of West Virginia in another statute where it actually intended to deal with service stations. Code of West Virginia, ch. 11, art. 14, sec. 2, lays a specific license tax upon "each filling station or place of business in this State *from which* gasoline is sold at retail" and upon "each distributing station or place of business *from which*" gasoline is sold for re-sale or distribution. Commenting upon this, the district court said (R. 268-269):

> "It is to be noted that here where the legislature was plainly dealing with the particular subject matter of filling stations it appropriately used precise words which can leave no doubt as to the meaning, and in view of this precise particularity it is not rea-

> sonable to construe the general language of the 'Chain Store Act', relating to a subject matter of different popular conception, to be inclusive of the particular subject matter so precisely described in other legislation."

There are other vital differences between a service station and a store. In a customary sale in a store, the transfer to the buyer effects no change in the characteristics of the goods purchased. Filling stations are designed for the servicing of automobiles *in operation*. Cars require motor fuel, oils and greases in order to run, and they also require at times the repair or replacement of tires, batteries and other accessories. These are usually emergency jobs and must be taken care of at the roadside service station before the motorist can proceed on his way. They can not be provided for in advance. Essentially the situation of the motorist is comparable to that of the man who purchases a meal in a restaurant, or the driver of a team who has his animals fed at a livery stable. The distinction between commodities so purchased and those purchased at an ordinary store is that the fuel and lubricants purchased at a filling station are not handed to the purchaser, but are *placed at once in motor vehicles* for immediate consumption. They usually are not transported elsewhere for disposition or use.

This difference in the service rendered at a filling station and in the transaction of selling and purchasing which takes place at an ordinary store unquestionably is a substantial basis for the popular conception which dissociates filling stations from "stores". Indeed it is responsible for the distinctive names "filling station" and "service station" which commonly identify such places. A service station is a place where gasoline and oil are *applied to cars*. A "store"

which merely sold and delivered such motor supplies to the customer would receive little or no patronage in this country, though it is known that in certain foreign countries gasoline and oil are customarily so sold. We *demand* the incidental service which characterizes the American roadside station, and differentiates it from a place of mere merchandising.

Some insight into the aim and spirit of this Act, as written, is afforded by noting the trend of public thought on the chain store question generally. Reliable sources of information are the reports of the Federal Trade Commission on chain store operations (Senate Document No. 31, Seventy-second Congress, 1st Sess. entitled "Scope of the Chain Store Inquiry"; Senate Resolution No. 224, 69 CONG. REC. 8522, Seventieth Congress, 1st Sess.), the chain store statutes throughout the country, and the approval by all courts, state and federal, of the legislative determination expressly to exclude service stations from such statutes. The service station business is carried on very much in the same manner everywhere, and this material shows how prevalent is the belief that multiple service stations should not be subjected to this type of tax measure, and do not fall within the reasons for such legislation.

Commenting upon this situation, the district court said (R. 269-70):

> "The essential difference between filling stations and stores generally is not only well marked in popular understanding but has been judicially expressed in recent cases by the courts. * * * And in some cases the contention has been submitted that the exclusion of filling stations from the incidence of general chain store legislation vitiates the Act in its constitutional requirement of equality of operation. But this contention has been rejected."

The district court referred particularly to the cases of *Southern Grocery Stores v. South Carolina Tax Commission*, 55 F. (2d) 931, 933, and *Liggett v. Lee*, 288 U. S. 517, 538. In *Liggett v. Amos*, 104 Fla. 609, 141 So. 153, the Supreme Court of Florida said "filling stations are *inherently different* from ordinary retail stores." On appeal, this Court justified the exclusion of filling stations on the ground of the state's power to impose varying taxes on "different trades and professions." In the *Southern Grocery Stores* case, *supra*, JUDGE PARKER said:

> "Such filling stations are *quite distinct* from ordinary stores or mercantile estbalishments. Of course, if the operator of a filling station should operate a store or mercantile establishment in connection therewith, such stores would unquestionably be subject to the tax prescribed by the statute." (Italics ours.)

The appellant (Brief, 64-5) suggests that the language in these opinions is "susceptible of the interpretation that filling stations were at least impliedly recognized as stores, which but for the specific exemptions would have been included within the provisions of the respective acts." While the approval of an exclusion of filling stations is not necessarily an inferential holding that they cannot be included expressly in such acts, yet the clear recognition in these cases of a distinction, inherent and popular, between ordinary stores and filling stations is at least persuasive of our view as to construction. The appellant takes one sentence out of its context from the opinion in the *Southern Grocery Stores* case and bases his comment thereon. He does not refer to that portion of the opinion quoted above.

The argument which appellant makes in this connection was disapproved by the Supreme Court of Idaho in *J. C.*

Penney v. Diefendorf (Ida. 1934, rehearing denied) 32 P. (2d) 784, 787-788. After referring to the decision of the Wisconsin court in the *Wadhams* case, *supra*, the Idaho court said:

> "The provisions contained in sections 7 and 8 of the act excluding, by classification, gasoline filling stations need not necessarily come within the rules of law applicable to exemptions from taxation. Such provisions are in the nature of legislative construction of the classification for taxation purposes intended to be made by the act itself. A gasoline filling station may or may not be subject to the tax, depending upon the fact as to whether such a station is operated in connection with, or as a part of, a store or mercantile establishment as defined by the provisions of this law. * * *
>
> "Appellant argues, however, that the very fact that in section 8, in which is defined the term 'store,' it is provided that gasoline filling stations should not come within such term, it is obvious that the legislature had in mind that gasoline filling stations, under the definition, were 'stores'. It does not appear to us that such an inference can be logically drawn from the provisions, as contended for, rather that the legislature had in mind that gasoline filling stations are not 'stores' as the term is generally and ordinarily used and understood, and in order to avoid any question such as arose in the Wisconsin case, where filling stations were not specifically excluded, specific provision was made to exclude the same from the classification of stores. The reasonsoning used by the Wisconsin court seems most persuasive and logical. No one would contend that if a person was asked to stop at the first store on the right-hand side of a business street in the city, that such party would stop at a shoe-shining parlor. Yet such a parlor might sell some shoe strings and shoe

polish, all of which might be considered as goods, wares and merchandise. See the very recent case of Standard Oil Company of New Jersey v. Fox (D. C. S. D. W. Va.) 6 F. Supp. 494, decided March 1, 1934, following the Wisconsin rule and giving the most cogent reasons why gasoline filling stations should not be included within the classification of general commodity chains. But considering the provision excluding gasoline filling stations, as creating a classification thereby granting an exemption, we believe such classification is absolutely justified and valid under the authorities."

After considering and approving the decision in the *Wadhams* case, the district court said (R. 266-8):

"There are other, and, in our view, even more persuasive considerations which lead to the same conclusion. We are here construing a statute which is familiarly known as a 'chain store act', a type of legislation which now exists in some nineteen states and in recent years has been considered in numerous judicial decisions. The essential principle of these Acts is to impose taxation in the form of license fees for the privilege of conducting stores, on a graduated scale, dependent upon the number of units or stores operated or controlled under one management. The type of business enterprise affected by such statutes is well identified in the public mind, but it is reasonably clear that the characteristics which serve to classify 'chain stores' as such, as distinct from ordinary stores, do not apply to various other business enterprises involving control of multiple units. Thus a chain of hotels in one or more states has a similar feature of unified ownership or management but has never been thought to be within the provision of these chain store acts although literally also they are places at which goods, wares and merchandise are sold. Similarly it may be said that filling stations

meet the needs of the touring automobiles in the same general way that hotels and restaurants provide necessities for the traveler. The roadside filling or service station is the modern substitute for the livery stable in connection with an inn or tavern in days of travel by stagecoach. The dominant characteristic of the business is the 'filling' of automobiles with gasoline, oil and water, and the rendering of 'service' to the motorist—hence the name which aptly describes the business. Such transactions are in public thought quite distinct from the purchase of goods at an ordinary store.

"Probably the greatest objection to chain stores is their tendency to eliminate the individual storekeeper, an occupation of long standing; but this cannot be said to be true of the chain of filling stations which is itself a feature of a new industry, filling a new public need, and being itself as much a pioneer in the new development of the automobile and petroleum industry as is the single independent station.

"The filling or service station is thoroughly identified in the popular mind as a thing which is sui generis and the gasoline industry, including particularly the sale of gasoline at retail, has been the subject of separate legislation, it is safe to say, in every state of the Union. Legislation affecting chain stores and legislation affecting service stations are separate and distinct subject matter each of which which respectively has had its own course and, so far as we are advised, they have followed parallel lines which do not intersect in common thought and understanding. There has been no body of public thought or literature coming to our attention which has identified the chain of filling stations with the characteristic features commonly associated with the popular conception of chain stores. And the somewhat elaborate stipulation of facts in the case very clearly leads to the conclusion that the combined characteristics which feature the typical chain store

system and which have served as a basis for special classification for purposes of taxation do not inhere in multiple ownership or control of filling stations as compared with individual or independent ownership and operation of a single filling station. Therefore in searching for the meaning of the legislative definition of the word 'store' as used in this 'Chain Store Act', it is not reasonable, in our opinion, to determine that the typical filling or service station is a store as the term was defined in this 'Chain Store Act', in the absence of language which plainly indicates from its context that such stations were intended to be included."

3. The Incidental Sale of Accessories Does Not Change the Controlling Character of Appellee's Service Stations.

At appellee's 101 owned and operated stations it has offered for sale during the past few years "automobile tires, batteries, spark plugs, windshield wiper blades, and a limited variety of other automobile accessories and supplies." (R. 147-148.)

The gross revenue from the sale of such accessories and supplies has been relatively very small, amounting to but 5.6% of the total revenue from these company-owned stations for the period of three and two-thirds years from 1930-1933. In the year 1932 the sales of such articles amounted to 6.3% of total receipts at such stations. (R. 148.) Appellant terms these sales as "appreciable" and infers that they tend to characterize the stations as "stores".

The district court, in rejecting this contention, said:

> "It is apparent also from the facts that sales of these articles are incidental only and are substantially

> for service to automobiles en route rather than the vending of merchandise in the usual way. This small incidental sale of articles of merchandise is not sufficient in our opinion to convert a service station, otherwise not subject to the Act, into a store within the Act any more than the incidental sale of cigars and newspapers and flowers in the lobby of a hotel makes the latter a store as distinct from a hotel or restaurant. It is the dominant nature of the business which characterizes it for purposes of taxation. * * * Of course, as was pointed out in the Wadhams Oil Company case, it may become a question of fact with regard to any particular station whether by reason of the extent of its sale of accessories or otherwise its dominant characteristic has become that of a store rather than a mere service station." (R. 275-276.)

Supporting authorities are: *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 270 S. W. 605; *Cesar v. Virgin*, 207 Ala. 148, 92 So. 406; *Swanson v. DeVine*, 49 Utah 1, 160 Pac. 872; *New Galt House Co. v. City of Louisville*, 129 Ky. 341, 111 S. W. 351, 352; *Carney v. Hamilton*, 89 Miss. 747, 42 So. 378; *Planters' Lumber Co. v. Wells*, 147 Miss. 279, 112 So. 8; *Piedmont Oil Co. v. Kennedy*, 165 Tenn. 375, 54 S. W. (2d) 958; *Debenham v. Short* (Tex. Civ. App.) 199 S. W. 1147, 1148; *Wadhams Oil Co. v. State* (Wis.) *supra*, 245 N. W. 646, 649.

There can be no reasonable doubt as to the basic nature of the appellee's establishments. Without exception, they transact predominantly a service station business, and are not "stores" in popular acceptation. At its 848 leased and vending privilege outlets, appellee is engaged exclusively in the sale of petroleum products. The commission agency agreements, under which such stations are operated, and to

which appellant refers at page 66 of his brief, specifically limit the agency relationship to "gasoline and other motor fuels, motor oils, greases and other petroleum products." (R. 53). Frequently, the "agent" sells non-petroleum products and accessories sold to him by the appellant and by other companies, but as to such transactions the agreements state that the "agent" acts "upon his own personal account * * * not in the name of, on behalf of, or for the account of" the appellee. (R. 53-4, 148.) The stipulation (R. 148) states that the agents may buy their supplies of non-petroleum products either from the appellee or others, and that when purchased from the appellee they are acquired under the terms provided in certain printed forms exhibited in the original record. The import of all of which is that where the agents handle tires, accessories, etc., they do so in the same capacity and manner as any other dealer. Appellant did not concede this conclusion in the stipulation, but the agreed facts make the situation clear. In 1932 the sales value of all tires and tubes sold by appellee to these outlets was but $97,280.55. (R. 171-172.)

At the vending privilege outlets the appellee is not only engaged exclusively in the sale of petroleum products, but the appellee's lessor or agent in the sale of these goods is actually conducting some other principal business on the premises. The sale of appellee's gasoline, oils and greases is usually incident to the other business so conducted. On the basis of the same judicial authority which holds that the sale of non-petroleum products would not convert a filling station into a "store", so here the incidental sale of petroleum products by a coal company, garage owner, or country merchant does not change the business of a garage or of a

coal company or of a country store into a "store" of the appellee for the sale of gasoline.

The names of many of the vending privilege outlets (R. 46) disclose the true character of many of these places. It occasionally happens that more than one oil company maintains a leased or vending privilege outlet at the same location, in which event there is the spectacle of the principal business assessed with a nominal tax of $2.50, and each of the companies whose pumps are there installed assessed with a very substantial charge, dependent upon the number of other stations and outlets maintained by it in the state.

4. The Construction of the Language, as Written, is Sufficiently Clear and Certain to Render Unnecessary Resort to the Legislative History of the Act.

After the passage of House Bill No. 112 by the house of delegates, and upon the second reading in the senate, an amendment was proposed which would have provided "that the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products." (R. 119.) It was defeated by a vote of 15 to 13, with two members absent and not voting. (R. 122.) The district court attached no clear import to the defeat of this amendment, and regarded the language of the statute as sufficiently clear without reference to such uncertain legislative history. (R. 275.)

Authorities cited by the appellant tend to support the view that the rejection of an amendment may be considered in construing the doubtful language of an act. But in *Finlayson v. Shinnston*, 113 W. Va. 434, 168 S. E. 478, 480,

cited by appellant, the reference to an earlier rejected draft of a proposed constitutional amendment was a *mere make-weight* in the decision of the court which was also grounded on the application of the doctrine of *enumeratio unius est exclusio alterius* to the language written in the adopted constitutional amendment. The court there held primarily that the language of the constitutional amendment, as adopted, was so "plain and unequivocal" as to leave "no room for interpretation".

Where the language used in an act has a plain and obvious meaning, the settled rule of the Supreme Court of Appeals of West Virginia, and of other courts, is that reference to legislative history, such as debates, committee reports, and proposed changes considered or rejected, is neither necessary nor proper. *U. S. v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83; *Railroad Commission v. C. B. & Q. R. Co.*, 257 U. S. 563, 589; *Kelleher v. French*, 22 F. (2d) 341, 346; *State v. Harden*, 62 W. Va. 313, 330, 349, 350; *Lanham v. Buckhannon*, 97 W. Va. 339, 125 S. E. 157; *Gissey v. Board of Education*, 105 W. Va. 429, 433, 143 S. E. 111; *Kain v. Ashworth*, 119 Va. 605, 89 S. E. 857; 59 C. J. 953-7.

The Wisconsin court in the *Wadhams* case, *supra*, was dealing with a background of legislative history very similar to that involved here. At its regular session, the legislature of Wisconsin had rejected a chain store license tax statute which contained a clause specifically excluding filling stations from the operation of the act. A few weeks later at an extraordinary session it enacted the statute which came before the court for review. The State in that case asked for a rehearing of the original decision, and filed "a

lengthy argument with respect to the intent of the legislature." The court, however, adhered to its original view, stating *inter alia*: "The question is not what the legislature intended, but what did it mean when it used the language quoted." (246 N. W. 688.)

When the meaning of a statute is being considered, resort is first had to the language itself. The accepted principle of construction looks to the ordinary, popular sense in which words are used as the meaning to be accorded to the words of a statute. Common usage ascribes to the word "store" a signification which is not inclusive of "filling stations". That signification is so plain and certain as to require no resort to secondary sources like the rejected amendment in question, which, if considered at all, serves only to create doubt. The legislative history of an act is never more than a matter for consideration, and the weight to be attached to it depends upon the circumstances of each situation. In this case, the implication from the rejection of the amendment by one branch of the legislature is by no means of clear import, and since no definite inferences may be drawn from such action, it must be disregarded.

The appellant's claim with reference to the rejected amendment involves an assumption as to the motives and intentions of those who voted thereon. The assumption is that some members of the senate considered that the word "stores" included filling stations. In view of the express definition actually adopted is it not more reasonable to assume that members voted to reject the amendment as being unnecessary or superfluous?

Moreover, the proposed amendment would have excluded from the operation of the Act only those stations which dealt *exclusively* in petroleum products. By implication the amendment probably would have extended the tax to filling stations which carried automobile accessories, in however limited quantities. It can be very safely assumed that such extension was not favored, the fact being that a majority of filling stations in the state do handle limited varieties of articles other than gasoline and oils. Those who held this view no doubt preferred not to becloud the common meaning of the term "stores" by impractical and artificial statutory phraseology. How can the rejection of the amendment by two votes be interpreted as a clear indication that the Senate *meant to tax filling stations,* including those stations dealing incidentally in non-petroleum products, in the face of the fact that the rejected amendment would have accomplished that very result?

It is by no means clear that those who voted to reject the proposed amendment were voicing a specific intent to impose a tax upon filling stations. They may or may not have intended to bring about a result exactly opposite to that proposed by the amendment. If the rejection of an amendment were inevitably and conclusively considered to evidence such an intent, the possibilities arising simply from the offering of an amendment, even if it were rejected, would be tremendous. Resort to such tactics would then greatly embarrass the consideration of such proposals upon their merits. Where the possibility of confusion as to purpose and intent has been shown to exist, the courts have not been hesitant in refusing to give any weight to the rejection. Indeed, in certain cases they have not refrained from giving a statute the same effect *as if the rejected amendment had been adopted.*

In *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 317-318, this Court had occasion to consider the legislative history of the Sherman Anti-Trust Act of 1890. When that measure was before the House an amendment was adopted extending its provisions to "any contract for the purpose of preventing competition in the transportation of persons or property." When the bill reached the Senate, the amendment was further revised to apply to "any such contract as tended to raise prices for transportation above what was just and reasonable." Subsequently, both amendments were dropped from the act. Nevertheless, this Court found that the act applied to transportation contracts. The decision rested upon the language of the statute itself, because the debates in the Congress revealed such a variety of views that it was impossible to determine "what were the views of a majority of the members of each house in relation to the meaning of the act."

In *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, the legislature had rejected an amendment limiting certain provisions to domestic insurance companies. Yet the court held that the statute was so limited, and said:

> "This argument assumes that the only reason moving members of the legislature to oppose such amendment was that they agreed with the attorney general in his construction of the act, and desired the act to stand as he construed it. But how can we know that this assumption is true? While some members may have acted from that motive, is it not just as reasonable to suppose that others differed with him in his construction of the law, and voted against the amendment on the ground that it was unnecessary and a needless waste of time to pass an amendment in order to make the law mean what they supposed it already meant? The settled rule,

> established by the highest authority, is that but little weight should be attached to expressions of individual members of the legislature, or to the fact that certain amendments were rejected. Aldridge v. Williams 3 How. 24, opinion by Chief Justice Taney; Black, Interp. Laws, 226." (51 S. W. 633, 634.)

In *Murray Hospital v. Angrove* (Mont.) 10 P. (2d) 577, the court found that injuries not sustained in course of employment were included within the terms of hospitalization contracts despite the rejection of an amendment which would have expressly included them. The court said:

> "It may be that the attempt was made merely for the purpose of overcoming adverse rulings by the clarification of the act, and it is as reasonable to presume that the House, in rejecting the amendment, determined that it was so 'plain, simple, direct and unambiguous' as to require no interpretation or clarification, as that the House refused to 'change' the law."

Other cases present the same situation. In *Dist. of Columbia v. Washington Market Co.*, 3 MacArth. (D. C.) 559, *aff'd*, 108 U. S. 243, it was said:

> "This amendment was rejected; but it may be urged with equal plausibility, on the one hand, that congress rejected it because it determined to vest the final power in the city authorities; and on the other, that the reason for the rejection was the belief that the law only authorized an inquiry or preliminary treaty about the land. We are therefore forced to examine the language itself, unassisted by extraneous aids."

An interesting analogous situation is presented in *Murdock v. City of Memphis*, 20 Wall. (U. S.) 590, 618. In

amending the Judiciary Act, the Congress in the Act of 1867 omitted the provision of the Act of 1789, which expressly restricted this Court, in cases coming from state courts, to reversals based upon errors arising on federal questions and appearing on the face of the record. Counsel, therefore, argued that pursuant to the amendment the Court was empowered to enter reversals based on non-federal questions. But MR. JUSTICE MILLER said, for the Court, that the precise motives which induced the omission of this clause could not be ascertained with any degree of satisfaction, and, mentioning several possible reasons therefor, he concluded that there was "no sufficient reason for holding that Congress, by repealing or omitting this restrictive clause, intended to enact affirmatively the thing which that clause had prohibited."

We do not suggest that legislative history is never of evidential weight. In some instances, there may be ambiguity of such character that the record of amendments and the like may be of peculiar value as an aid to interpretation. But, where, as here, the language of the statute is of plain import, considered in the light of the settled principle which accords to statutory language its ordinary and popular meaning, and where different grounds are reasonably assignable for the rejection of the amendment, the legislative history has no probative value. The rejection of the amendment here is wholly consistent with the reasoning that members of the senate, when they used the word "store", intended it to have its ordinary every-day significance, and did not conceive of it as extending to a filling station. Many senators must have realized the inexpediency of writing into the Act an express legislative construction, excluding filling stations, and so inviting attack in the courts, however groundless,

based on the alleged invalidity of such exclusion. Again, the adoption of the amendment would have extended the tax to filling stations dealing in non-petroleum products, however slightly. It is most reasonable to assume that many did not favor such discrimination between stations dealing exclusively in petroleum products and those handling other commodities incidentally. The coordinate branch of the legislature, the House of Delegates, was not consulted on the amendment. Without the amendment, the language of the statute was clear. It included "stores" only.

5. The Act Must Be Construed Strictly in Favor of the Taxpayer.

The probative value of the rejected amendment, which has just been discussed, could be considered only if the language of the Act were of doubtful meaning. And, even if it were doubtful, which it is not, the first applicable rule of construction would be that ambiguities in a taxing statute must be resolved in favor of the person upon whom it is sought to impose the tax. See *Wadhams Oil Co. v. State, supra,* 246 N. W. 687, 688, (where the rule is cited only incidentally).

This rule is particularly applicable where the taxing statute includes penal provisions. 25 R. C. L. 1081, title Statutes, sec. 301; *Gould v. Gould,* 245 U. S. 151, 153; *Old Colony R. Co. v. Com'r of Internal Revenue,* 284 U. S. 552; *Alyea-Nichols Co. v. U. S.,* 12 F. (2d) 998; *Fry v. Ronceverte,* 93 W. Va. 388, 394, 117 S. E. 140; *Kloss v. Commonwealth,* 103 Va. 864, 49 S. E. 655.

The rule of strict construction applies peculiarly to the statute involved herein. It is provided in the Act that a

violation thereof shall constitute a misdemeanor, and that any person, firm or corporation violating any of its provisions, upon conviction shall be fined not less than $25 nor more than $100, and that each and every day during the continuance of such violation shall constitute a separate and distinct offense. In its bill of complaint appellee averred that under the appellant's rulings it was subject potentially to a maximum penalty of over $100,000 per day for its alleged continued violation of the Act. (R. 5-6.) These penalties are without precedent in the revenue laws of the state. No statute relating to property taxation, or to occupational taxes, contains any such drastic penalties as those here involved.

Not only is the present statute a revenue act containing drastic penal provisions, but it is very definitely a limitation upon the common right of engaging in trade and business. Statutes of this character are construed strictly in favor of the taxpayer and against the taxing power. 59 C. J. 1131; *Combined Saw & Planer Co. v. Flournoy*, 88 Va. 1029, 14 S. E. 976.

6. The Taxing and Licensing of Service Stations as "Stores" Would Violate the Presumption Against Multiple Taxation.

The practical effect of applying the "store" tax to service stations and to bulk distributing plants is to impose a double license tax on the same privilege.

This Act is not a taxing measure alone; it is specifically a licensing statute. A particular form of application is required of each "store" owner or operator, and the license

must be displayed *in* each "store". Without this license it is unlawful for anyone to operate a "store" in the state.

But with respect to the operation of bulk plants and service stations, an owner or operator is governed by a different statute, which requires the issuance of a license by the tax commissioner for the operation of all such establishments. CODE OF WEST VIRGINIA, ch. 11, art. 14. No reference to this statute appears in House Bill No. 112.

There has been a special excise tax on persons selling gasoline in the state since 1923 (Acts 1923, ch. 34). The Legislature of 1923 imposed a license tax of $1.00 and $5.00 upon filling stations and distributing plants, respectively, and a gallonage tax of 3 cents per gallon. The Legislature of 1925 increased the license taxes substantially to $5.00 and $25.00, and the gallonage tax from 3 cents to 3½ cents. Chapter 18 of the Acts of 1927, by its title, imposed an occupational tax at flat rates upon distributors and retail dealers in gasoline, and a special excise tax upon such persons based on quantities of gasoline sold, purchased or used in the state. The present statute is a reenactment of the 1927 law. Section 2 (CODE OF WEST VIRGINIA, art. 14, ch. 11), imposes an annual license tax of $5.00 for each "distributing station or place of business or agency . . . at or from which gasoline is sold for resale or distribution or at which gasoline is produced, refined or compounded" and $1.00 for "each filling station or place of business from which gasoline is sold at retail." The section also provides that "the privilege granted through the payment of the annual license tax shall be conditioned upon the licensee complying with the requirements of this article pertaining to the filing of statements and the payment of the excise tax imposed by section three hereof."

Section three shows upon whom the excise tax is imposed:

> "*There is hereby imposed, upon every person who is a distributor, retail dealer or importer under the terms of this article, an excise tax based on the quantities of all gasoline sold, purchased or used in this State . . . equivalent to four cents per gallon thereof* . . . A distributor shall use as the measure of the tax the gallonage sold for whatever use in this State . . . and the gallonage used by him in motor vehicles operated in this State; a retail dealer shall use as the measure of the tax the gallonage purchased or obtained by him, and an importer shall use as the measure of the tax the gallonage purchased by him for use in motor vehicles to be operated in this State.
>
> "The special excise tax imposed by this article shall be paid by the person first selling, or using in this State the gallonage of gasoline which under this article shall form the measure of such tax; but in no case shall any such gallonage be used more than once in determining taxes due thereunder. . . .
>
> "The excise tax imposed by this article shall accrue from the date of sale or purchase of the gasoline, whichever accords with the method of reporting required by this article, or conforms with the election of the taxpayer in the case of distributors, and the penalties imposed . . . shall accrue from the date they become due and payable, *and such taxes and penalties shall be and remain a charge and lien upon the properties, both personal and real, of the person liable to pay such taxes and penalties,* superior to any lien created after such taxes and penalties accrue; and no title shall vest or be transferred as to any such property, except subject to the lien for such taxes and penalties, and no such property shall be transferred or delivered, in whole or in part until after payment to the tax commissioner is made of the amount of such taxes and penalties due." (Italics ours.) (R. 105, 108.)

By this statute the legislature has made it illegal for any person to operate a filling station or bulk plant without complying with its conditions. The tax is a license fee or occupation tax imposed as a condition precedent to the privilege of engaging in the business.

There is this situation: chapter 11, above quoted, imposes taxes on filling stations and bulk plants at the respective rates of $1.00 and $5.00, together with a flat-rate gallonage excise tax of 4 cents. House Bill No. 112 levies a license tax of $2.00 upon every first "store" and progressively graduated taxes upon additional "stores" in a single system. Under chapter 11 the state is paid annually a license tax at flat rates for the operation of all the bulk plants, filling stations and leased and vending privilege outlets comprising the very system upon which the appellant has sought to assess to the appellee the "stores" tax. In practical effect chapter 11 imposes a tax upon the distributing outlets for appellee's petroleum products, proportioned according to their number. The only difference between that exaction and the present "stores" tax is that the rates of the latter are progressive rather than proportional.

There is a very strong presumption against any interpretation of House Bill 112 which would result in a multiple license and tax upon the privilege of operating the same establishments. *Tennessee v. Whitworth*, 117 U. S. 129, 137; *State ex re Dillon v. Graybeal*, 60 W. Va. 357, 55 S. E. 398. The presumption is equally applicable to non-property taxes. *Wingfield v. South Carolina Tax Comm.*, 147 S. C. 123, 144 S. E. 846; *Quick Service Tire Co. v. Smith*, 156 Tenn. 96, 299 S. W. 807; *N. Y .Cent. R. Co. v. Stevenson*, 277 Ill. 474, 115 N. E. 633; *Britt v. Cook*, 157 Tenn. 54, 6 S. W. (2d) 322; *In re Barbour's Estate*, 185

App. Div. 445, 173 N. Y. S. 276, *aff'd*, 226 N. Y. 639, 123 N. E. 854. It has been definitely applied to the attempted duplication of a franchise or license tax in *Greene v. E. H. Taylor, Jr. & Sons*, 184 Ky. 789, 212 S. W. 925. The same rule has been applied to attempts to exact multiple license fees. 21 Am. & Eng. Ency. Law (2d ed.) 814; *Walker v. New Orleans*, 31 La. Ann. 828 (attempt to collect license fee for vehicle plates or tags in addition to license tax imposed upon the operation of the vehicles); *City of Newport v. Fitzer*, 131 Ky. 544, 115 S. W. 742 (attempt to collect vehicle license tax in addition to peddler's license giving right to use such vehicle); *Atlantic City v. Hemsley*, 76 N. J. L. 354, 70 Atl. 322 (attempt to levy license tax upon the keeping of sleeping rooms in addition to license tax on hotels).

Just as the general tax for the privilege of using a vehicle on the highways was held not to apply to one who had already paid the tax for the privilege of peddling with a wagon; just as in *Bell v. Watson & Bro.*, 2 Lea. (Tenn.) 328, a tax for the privilege of running hacks for profit was held not to include one who had already paid the tax for the privilege of keeping a livery stable; so here, the presumption against double taxation excludes from the general tax on the privilege of operating a "store" one who has already paid the tax for the privilege of operating a filling station. A number of the authorities cited invoke the presumption where the language of the subsequent general statute might *literally* include the particular business which has already been specifically dealt with; *a fortiori*, the subsequent general enactment cannot be so applied where it does not *by its terms* cover the particular business or occupation.

The presumption has been applied to the gasoline distribution business. In *Gulf Refining Co. v. Chattanooga*, 136 Tenn. 305, 190 S. W. 463, the plaintiff, a vendor of oils and gasoline, was liable for a privilege tax for conducting that business. The city also attempted to impose a *merchants privilege tax* on the same business, but the court applied the presumption, and invalidated the attempt to require the plaintiff to "pay two taxes for the same privilege as that of selling oils and gasoline in the state of Tennessee." In *Piedmont Oil Co. v. Kennedy*, 165 Tenn. 375, 54 S. W. (2d) 958, the court, in avoiding a construction that would involve double taxation, held that one who had paid the tax for operating a filling station was not liable for a tax on oil depots. So here, since the appellee is liable for a specific privilege tax for operating its filling stations and bulk plants, it should not be held to be within the general "store" license statute. In the absence of express language, it is not to be presumed that the legislature intended to tax the same privilege twice.

The appellant (Brief, 36-37) seeks to minimize the amount of taxes paid by the appellee in the state, mainly by treating the gallonage tax as "an excise tax paid by the consumer." He cites *Gregg Dyeing Co. v. Query*, 286 U. S. 472, which involved a wholly different type of gasoline excise statute. It was designed to supplement an existing statute which imposed a tax in terms on dealers in gasoline. The later enactment was intended to reach gasoline, imported by large consumers, which was tax-free under the other statute. Every section of the West Virginia statute contains definite language indicating that the license is required, and the (gallonage) tax is imposed, for the privilege of operating filling stations and bulk plants. As the district court said (R. 269):

> "While in practical effect this tax is passed on to the consumer it nevertheless is a tax primarily on the vendor and furnishes a very material part of the whole of the state revenues, as is true in many other states."

The courts have held, under similar statutes, that consumers could not raise the question of the constitutional validity of motor fuel tax statutes, which,like the West Virginia statute, imposed the tax upon the dealer and distributor. *Williams v. Riley,* 280 U. S. 78. In *Central Transfer Co. v. Commercial Oil Co.,* 45 F. (2d) 400, at 402, it was well stated by the court that

> "Here . . . the tax is laid against distributors and dealers only. It is a matter of no legal importance, so far as concerns the matter presently at hand, whether or not the distributors and dealers pass the tax on to the consumer. It may be conceded, as a matter known of all men, that those against whom the tax is directly laid do ordinarily pass it on to the consumer. But this is a matter, not of law, but of business practice. True it is that the Missouri Motor Fuel Law, in section 30 thereof . . . requires a notice to be posted by a distributor segregating the price of the gasoline from the amount of the tax. But this does not preclude the dealer from selling gasoline at any price he may see fit. In effect, such a notice merely informs the purchasing public that the dealer is paying a tax of two cents on each gallon of gasoline sold. Such provision and such notice cannot be construed as shifting the tax from the distributor to the consumer, in the teeth of this statute, which in section 4 thereof . . . says: 'Every dealer shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2) cents for each gallon of motor vehicle fuels sold or dis-

tributed by such dealer in this state during such year.'"

If the taxes are unpaid, they become a lien on the properties of the dealers and distributors who are liable to the tax. If the money received by the appellee is lost or stolen, or if the amount charged to customers is uncollected, the appellee must nevertheless pay the tax, and its property is security therefor. The fact is that the service station business, through the taxes on motor fuels and motor vehicles, is already heavily taxed in West Virginia, and that fact has great pertinence in considering whether the legislature intended to include such stations within the operation of the chain store act.

The business of distributing petroleum products is bearing a tremendous part of the tax burden in this state. The tables in the record (R. 198, 200) indicate the extent to which the business is burdened directly, and indirectly through the fees imposed on the operation of motor vehicles. The first table (R. 198) shows that taxpayers engaged in this business, including refiners, wholesale distributors, and filling station operators, have paid their fair proportion of the gross sales tax, denominated a business and occupation privilege tax (CODE OF WEST VIRGINIA, ch. 11, art. 13, sec. 2). The record (R. 203) also shows that had the increases in the gross sales tax rates, provided by the tax act of 1933, been in effect in the preceding years, the appellee's gross sales tax would have been increased 89.46% in 1930; 81.38% in 1931, and 76.24% in 1932. This illustrates the tremendous increase in the rates of this tax.

From the second table (R. 200) computations have been made of the percentage relationship of the special taxes on

distributors of petroleum products and on the operation of motor vehicles to total state tax receipts. For the fiscal years from 1927 to 1933, it is found that 34%, 39%, 39%, 42%, 43%, 45%, and 47% of the state's entire revenue, respectively, came from motor vehicle and gasoline taxes and fees. For the fiscal year 1933, the gallonage excise tax alone constituted 26% of the state's entire revenue; and, in addition thereto, those engaged in this heavily taxed business paid their proportional share of all other forms of state taxation.

It has been judicially recognized that in recent years the business of distributing petroleum products has been singled out for tax exactions unparalleled in the field of legitimate business. More than once it has been stated by the courts that these special and unusual tax burdens warrant the exclusion of filling stations from taxes laid upon business generally, or justify the presumption that filling stations were not intended to be included. In the *Wadhams* case, *supra*, the Wisconsin court held that the Wisconsin motor vehicle fuel tax, which does not purport to be other than a "tax upon the owners and operators of motor vehicles" (sec. 78.01), afforded some support for the construction which the court placed upon the chain store statute on other grounds:

> "Considering this (chain store) statute generally in connection with other statutes relating to taxes, the legislature may well have thought that, having already imposed a sales tax of 5 cents a gallon upon the use of gasoline by the operators of motor vehicles, approximately 33 1-3 per cent ad valorem, the business was already baring its fair share of the tax burden."
>
> 246 N. W. 688-689.

Similar weight was attached in *Liggett v. Lee,* 288 U. S. 517, 538, to an existing Florida statute, which imposed a license and gallonage excise tax upon all dealers in gasoline, including operators of filling stations; other cases to the same effect are *Liggett v. Amos,* 104 Fla. 609, 141 So. 153; *Southern Grocery Stores v. South Carolina Tax Comm.,* 55 F. (2d) 931, 933; *J. C. Penney Co. v. Diefendorf* (Ida. 1934) 32 P. (2d) 784, 790.

As the district court points out, it seems most improbable that the legislature would have left to inference the inclusion of the principal taxpayers to be affected by the tax (R. 270). In the face of the presumption against double taxation, and in the light of the fact that the Act makes no mention of the business which, under appellant's interpretation, would be required to pay substantially all of the tax, the appellant's construction of the statute is not warranted either by judicial authority or by common reason.

7. The Act Does Not Apply to Appellee's Bulk Distributing Plants.

The district court did not pass specifically upon the appellee's contention with respect to its bulk distributing plants, but it made the following general observation:

> " . . . it (the appellee) operated 54 bulk or distributing plants, maintained principally as supply depots for the storage and distribution of petroleum products to the said service stations or dealers handling its products and to commercial and industrial consumers throughout the state. A relatively small quantity of petroleum products is sold on the premises of the bulk stations." (R. 242.)

The record contains a full statement of the character of bulk plant activities. (R. 12-13, 152-166.) These plants are strategically located at points accessible to water or rail facilities and to the trade. (R. 153, 163.) During the year 1932 approximately 23% of all deliveries of petroleum products from these plants in the state were made to appellee's owned and operated service stations, 43% to the leased and vending privilege outlets, and 33% to individual dealers and various industrial, commercial, and governmental consumers. So, in that year, approximately 66% of petroleum product deliveries from bulk plants went to appellee's own or agency stations. (R. 153.) Substantially all deliveries to commercial and industrial buyers were made under term contracts or pursuant to sales in the field by general salesmen who travel out of the branch office. The deliveries to the State are upon annual contracts made between the appellee and the several subdivisions or departments of the government.

The bulk plants are essentially storage depots or warehouses. If petroleum products were less bulky, fewer storage plants would be necessary. On the other hand, appellee would employ much the same traveling sales organization in the field. In other words, the 54 bulk plants are simply links in the system of handling and distribution.

The appellant points to the fact that about one-third of all gasoline sold by appellee is supplied from these plants to individual dealers and industrial consumers, and contends that, notwithstanding the fact that such deliveries are made against contract commitments previously obtained at the customer's place of business, the bulk plants are "places at which merchandise is sold." Whether the

appellee's contention in this respect is sound must be determined from the facts of its own business. Other companies may use their so-called bulk plants as branch offices, storage plants, and stations for the sale of products to the public like any ordinary service station. That is not the fact in the business of the appellee.

The physical make-up and operation of a typical bulk plant afford no basis for comparison with a wholesale "store" within the meaning of the Act. The description of the bulk plant in the record shows that it consists mainly of steel storage tanks for bulk products, a brick or steel warehouse for packed petroleum products, a pumphouse with power-unit installation for pumping the bulk products from railroad tank cars into the steel storage tanks, tank wagon loading platforms, and garages for the motor tank wagons and motor tank and barrel trucks. There is a wire fence enclosure. No provision is made for the display of products, or for the attraction or solicitation of business at the plant. There are no pumps or other vending facilities there. (R. 153.) Indeed, it is the fixed policy of the appellee to discourage the public from coming upon the premises.

The occasional sales made to persons calling at the appellee's bulk plants and carrying away products purchased are called "bulk at plant" sales. (R. 153, 162.) When a motorist runs out of gasoline near a bulk plant, he may come there for sufficient gasoline to proceed on his way. Sometimes a farmer comes to the plant for kerosene for his requirements. These infrequent accomodation transactions in which the buyer comes to the plant and makes a purchase do not characterize these bulk plants as "stores" any more

than the incidental sale of cigars makes a hotel a store. The authorities cited in discussing the sale of accessories at filling stations also sustain the position that the sale of an insignificant quantity of products on the premises of certain bulk plants, as described, does not convert these warehousing depots into "stores."

The appellee's business in West Virginia is carried on through branch offices, mainly through the branch office located at Charleston. The record shows that the management and sales effort are completely concentrated in the branch office organization, as distinguished from the bulk plant organization. Twenty general salesmen cover the entire state and contact the trade. Their employment, remuneration, and working directions emanate from the branch office. Their principal duty is selling, and the performance of that duty takes them directly to the customer's place of business. They employ chiefly an annual contract form in negotiating for business, in which are forecast the minimum requirements of the customer who places periodic orders against the commitment. The contract is executed by the customer and sent to the branch office by the general salesman for execution by the appellee's representatives. Ordinarily, the motor-tank salesmen only take and fill orders against such commitments previously obtained by the general salesmen. Contracts and orders are referred to the most accessible bulk plant for filling. All books of accounts are kept at the branch offices in Charleston, or Baltimore (Maryland), and lines of credit are established at those offices.

The appellee does not deny that it does a wholesale business in the state, but the mere fact that *deliveries* are initiated

from the bulk plants by tank-wagon or tank-car does not indicate that such wholesale business is *carried on at the bulk plants*, so as to make them subject to this tax. The inquiry is not whether appellee does a wholesale business, but whether such business is done *at the bulk plants*. Certainly, a wholesale furniture establishment with one central business office and showroom, but with three warehouses, would be taxable on one location, not four. The bulk plant is as distinct from a wholesale "store" as any ordinary warehouse. Sales effected away from the premises cannot bring these bulk plants within the scope of the Act. And, even though occasional orders may be taken at the bulk plants, the sales do not take place there. Delivery is made to the various classes of buyers by tank-wagon or tank-car. "Where the buyer transmits an order to the seller and, without the intervention of a carrier, the seller fills such order by a delivery personally or through his agent to the buyer at the latter's place of residence, the view is generally taken that the buyer's place of residence is to be deemed the place of sale . . . ." 23 R. C. L. 1254, Sec. 71.

Had the legislature intended to include these bulk plants, it might have designated them "oil depots," as has been done in other states in imposing a specific tax thereon, or it could have used some appropriate language such as it employed in the statute imposing a license tax on "each distributing station . . . at or from which gasoline is sold for resale or distribution." But looking beyond the mere inaptness of the language used to cover bulk plants, the rule of construction is applicable here that doubt must be resolved in favor of the taxpayer.

V. Conclusion

We have discussed the two prime questions with respect to the application of the Act to service stations and bulk distributing plants, namely, the question of constitutionality and the question of construction. In the end, the two interact, for, as the district court pointed out, a persuasive consideration for the construction which excludes service stations and bulk plants from the scope of the Act is that a grave question of the constitutionality of the Act (both federal and state) is thereby avoided. (R. 270-1.) *U. S. v. LaFranca*, 282 U. S. 568, 574; *U. S. v. Jin Fuey Moy*, 241 U. S. 394, 401.

The statute should not be given a strained construction so as to include the appellee's business or any particular units of it. Had the legislature meant to include service stations and bulk plants in the term "stores", appropriate and adequate provisions would have been written into the law to bridge the wide differences and distinctions, not only as between ordinary chain stores and multiple service stations, but also as between the different kinds of outlets for petroleum products. The legislature is bound to have known that service stations far outnumber any class of "stores", and the statute imposing an annual license tax on "filling stations" and "distributing stations", shows that the members were fully cognizant of language suitable to cover such places of business. Many courts have pointed out the obvious and inherent distinctions between "filling stations" and "stores"; yet there is nothing in the wording or in the substance of the Act which indicates an intent to assimilate these establishments into one taxable class. Appellant contends for an application of the statute, which, in our view, is both unconstitutional and unintended by the legislature.

In the district court the appellee asserted that the tax statute violated the constitution of West Virginia, *first*, on the ground that the act conflicts with the uniformity provision of that constitution, and, *second*, on the ground that "classification and graduation" with respect to the taxation of occupations and privileges is forbidden by the Amendment of 1932. The district court discussed these points, indicating that equality and uniformity under the state constitution is essentially the same requirement as equality and due process under the Fourteenth Amendment. The Act being in violation of the latter, it equally violates the state constitutional provisions (CHESNUT, R. 270, 274-275). Having disposed of the case on other grounds, and there being no interpretation of the constitutional amendment by the state court, the district court deemed it unnecessary to express a definite opinion as to appellee's point that classification and graduation of privileges is forbidden. We recognize the force of this position, and in deference thereto we have confined the argument here to the unequal and discriminatory operation of the statute, and to its inapplicability to service station operators.

We respectfully ask that the decree of the district court enjoining the payment of the tax into the state treasury and directing the repayment thereof to the appellee be affirmed.

Respectfully submitted,

H. D. RUMMEL
DONALD O. BLAGG
A. G. STONE,
Solicitors for Appellee.

RUMMEL, BLAGG & STONE
Counsel
October 8, 1934.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 69.

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,

Appellant,

vs.

STANDARD OIL COMPANY OF NEW JERSEY, A CORPORATION CREATED UNDER THE LAWS OF THE STATE OF DELAWARE,

Appellee.

PETITION FOR REHEARING.

H. D. RUMMEL,
DONALD O. BLAGG,
A. G. STONE,
Counsel for Appellee.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 69.

FRED L. FOX, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia,

Appellant,

vs.

STANDARD OIL COMPANY OF NEW JERSEY, a corporation created under the laws of the State of Delaware,

Appellee.

PETITION FOR REHEARING.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the Standard Oil Company of New Jersey, the appellee in the above-entitled cause, by its counsel, and respectfully presents this petition for a rehearing of

the first and second points discussed in the opinion handed down in said cause on January 14, 1935, and states the following reasons in support thereof:

I.

Your petitioner respectfully says that the Court has grounded its determination, that there has been no denial of the equal protection of the laws guaranteed by the Fourteenth Amendment, upon principles which are erroneous as applied to a classified plan of taxation; and that an application of the principles, which your petitioner believes to be correct, necessarily will result in an affirmance of the decree of the district court.

The underlying principle upon which the Court determines that equal protection has not been denied is stated in the opinion substantially as follows:

> All "stores", including filling stations, which are in the same class on the basis of numbers, are subjected to an "equal rule"; therefore, the disparity in the actual burdens, to which such members are subjected, is not evidence of arbitrary discrimination.

Petitioner respectfully asserts that this proposition is an erroneous statement of the principles by which this case must be controlled.

A. The conclusion of the Court that the tax is not arbitrarily discriminatory is predicated upon the proposition that where the power to tax exists, the extent of the burden is exclusively a matter for the legislature. The application of this principle in effect excludes the constitutional guaranty of the equal protection of the laws from this case.

The Court determines that petitioner is not denied the equal protection of the laws on the ground that where the power to tax exists, the extent of the burden of the tax is for the legislature alone. Thus, the Court translates the familiar principle that the *amount* of a tax is a matter of legislative discretion into the proposition that the extent and distribution of the burdens in a classified system of taxation are immune from judicial restraint under the equal protection clause of the Constitution. This method of determining the law of the case is tantamount to stating that once the power to tax on a given theory is sanctioned, the legislature may do what it will, and that the results which flow from the practical operation of the tax do not present a proper subject for judicial inquiry under the equal protection clause.

Petitioner at no time has denied the power of the legislature to fix the amount of a tax. It recognizes the principle of the *Magnano* case, and would concede its applicability to the privilege of filling station operation, the selling of oleomargarine, or to any other taxable privilege. That is not this case. The present tax is a graduated tax upon a legislative classification, predicated solely upon the taxable attributes of the several groups

in the classification. It is not a tax upon subjects selected according to differences in kind. Such a classification involves the relationship of taxpayers, one to the other, and the validity of the classification depends upon whether the legislature has given due regard to that relationship. In this particular the legislature is subject to the definite constitutional limitation of equal protection, and a classification which results in gross discrimination cannot be justified on the theory that the extent of the taxing power rests with the legislature.

The classification effected by the present statute applies the same tax formula to taxpayers who are not similarly situated in fact. This is arbitrary discrimination.

This Court has repeatedly held that "classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159. There is ample authority that similarity of situation involves comparison of taxable values or attributes, and the facts of this case show that the taxable values or attributes of the filling station chains do not warrant the discriminatory burdens imposed upon them. On the basis of the relation of numbers of units to taxable attributes, filling station chains and general commodity chains are strikingly dissimilar.

Discrimination may be effected in two ways. It may result from the application of a different rule to persons similarly situated, or it may result from the enforcement of the same rule against persons who are not similarly situated. In either case the wrong done is the same.

The district court found, and this Court agrees, that the tax casts a burden upon the petitioner and other filling stations operators much heavier, "both absolutely and relatively to earnings, than any that is borne by others." This Court has pointed out that in 1932 the average gross revenue at the 101 company owned stations was $26,822 and the average for the 848 agency stations $3,892. The separation of owned from agency stations has no significance in this case. From the standpoint of the state, and for the purpose of this tax, all the 949 stations are of the same class and are taxed at the same rate. The average gross revenue for all was but $6,041, and the average net revenue but $248.37. The Court remarks that if the billing price to the stations includes a profit for refining and transportation, the business may show a gain when viewed in all its parts. The tremendous losses in the refining and transportation branches are shown in the record, but the profit or loss from the business *in all its parts* is not an issue. The tax is not on the integrated business of manufacturing and selling oil products, or any other commodity. The tax is on the privilege of operating marketing outlets, and the validity of the tax must be tested by its relation to that privilege and that privilege alone.

Recognizing the inevitable and peculiar effect upon the service station business, this Court justifies the tax with the statement that if the tax is oppressive, it is because the company has chosen to multiply its units and that its burden is attributable not to the law but to the exigencies of business. There are two answers to this. The first is that the organization of the system of stations antedated the chain store tax statute. Indeed it was enforced

retroactively to the first day of the year of its passage, and part of the money which is sought here to be recovered is the money which was paid under this retroactive aspect of the statute. The second and more fundamental answer is that if a tax violates the equal protection guaranty of the Constitution it does not lie with the state to say that it is not the law which imposes the burden, but the voluntary election of the taxpayer to engage in a business which falls within the language of the taxing statute.

The district court did not deny the principle of chain store taxation, but having determined, upon the basis of extensive findings of fact, that the practical effect of the statute "is to exact heavy taxes from a particular industry out of all proportion to the value of the privilege ejoyed" (Soper, R. 260), it concluded that the tax was so flagrantly disproportionate as between the stations and other chain organizations as to violate every conception of equal protection as defined by this Court in prior cases.

Notwithstanding that this Court finds, with the district court, that the gasoline stations inevitably must bear a burden much heavier (absolutely and relatively) than that borne by other chains, and notwithstanding the undisputed fact that these stations pay 84.46% of all taxes collected under the statute, the Court now says:

> "The classification is not arbitrary, but in normal operation has a rational relation to the subject matter to be taxed, the capacity to pay and the justice of the payment."

Had the tax been imposed in 1932, the average would have exceeded the net earnings at more than 900 of

appellee's stations. The figures for the first half of the year 1933 show that it was highly improbable that any agency station would earn the tax. Petitioner cites these figures here not to show confiscation or violation of due process, but to explain its failure to understand the statement that the tax has a rational relation to the subject matter, the capacity to pay or the justice of payment.

In every case cited by the Court the tax bore a relation to some tangible evidence of capacity to pay. With respect to the principle that the taxing policy of the state is not controlled by the profits of the taxpayers or the accidental inequalities of trade, petitioner says that it is no accidental inequality when the group of taxpayers who contribute 84% of the taxes collected are subjected to a capital levy, a burden not even remotely shared, absolutely or relatively, by others which are included in the same taxable class by the legislature.

B. Even though it be conceded that the privilege of operating a chain of stations and the privilege of operating a single station are separately taxable, the adoption of the "store" unit as the exclusive basis for the classification and graduation is arbitrary and without relation to taxable values.

The opinion stands on the principle that a graduation of the tax on chain organizations, based solely on the number of "stores," is not arbitrary, regardless of the extent to which the graduation is carried on that basis. The issue raised under this head is a narrow one, directed

only to the fact that the statute imposess the tax on the number of "stores" alone, without regard to gross or net earnings, or to any tangible factor by which the tax burden on different chain organizations may be even roughly equalized.

The record is replete with figures showing the gross inequality in the respective burdens as between long and short chains of filling stations, and as between commodity chains and filling station chains. This is so because the "store" unit is not a rational index of the taxable attributes of filling station chains. In order to complain one must be a member of a group unjustly discriminated against. Petitioner is such a taxpayer. It is under no duty to present a factual record showing as to other kinds of chain organization that the "store" unit is not a rational basis for graduating the tax. Petitioner is not primarily concerned with the inequalities in so far as they affect other filling station chains, but the record abundantly shows that the inequalities of which petitioner complains are present in as great or greater degree with respect to all other gasoline distributors operating 75 or more stations.

In the *Liggett* case this Court said that the county line basis for graduating the tax was so barren of relationship to the value of the privilege enjoyed by any chain that to use it was to deny the equal protection of the laws. The "store" unit, when applied to the privilege of operating filling station chains, is equally devoid of rational relationship to taxable values. It is very different, for example, from a tax based on gross income, fixing higher rates on chain establishments. Then, however high the rates (even

if in general operation confiscatory of profits in point of fact) it would be more plausible to urge that all members of the general class of chain organizations were taxed, according to a standard which takes into account, at least to some degree, the comparative capacity to pay and the comparative value of the privilege enjoyed, as reasonably indicated by the volume of business done in the state. *Cf:* Laws of Mississippi (1930) ch. 90, sec. 2-c, art. 1, imposing an additional tax equivalent to one-fourth of one per cent of the gross income of the business of persons operating more than five stores in the state, passed upon in *Penny Stores, Inc.* v. *Mitchell* (D. C. S. D. Miss. 1932) 59 F. (2d) 789, *aff'd,* 284 U. S. 576. Also *cf: Great Atlantic & Pacific Tea Co.* v. *City Spartanburg* (S. Car. 1933) 170 S. E. 273, involving a municipal ordinance classifying according to numbers of "stores" and measuring the tax on the basis of gross income. A tax based upon gross income is at least roughly related to a standard of value, albeit grave injustice may be worked in individual cases. A tax based solely upon "stores" as a unit is based upon no standard of value in filling station operation but upon a nebulous unit of measure which is entirely devoid of any tangible quality.

The practical effect of the use of such an arbitrary and meaningless basis for the graduation is demonstrated in this record by a comparison of average gross earnings, and average "store" tax per unit for various filling station operators doing business in directly competitive locations (Appellee's Original Brief, pp. 44-48, and Table No. 7), and by the stations of competing chains doing business in exactly the same manner. The substantial rates imposed by the Act result in a vastly greater

burden on long filling station chains than on those with less than 75 units, simply because the basis for measurement is the number of "stores" exclusively. Reduced to cents per gallon of motor fuels sold, the chain store tax of the appellee was equivalent in 1933 to .83 cent per gallon, while the tax on the competing chains within the highest bracket ranged from .27 cent per gallon in the case of the Pure Oil Company to 1.13 cents for the Gulf Refining Company. In contrast, representative short chains are the Atlantic Refining, American Oil, and Texas companies with "store" taxes equivalent to .001 cent, .004 cent and .002 cent per gallon, respectively. (Appellee's Original Brief, Table No. 6, column 15, p. 41.)

If the contrast be carried to the filling stations and the general commodity chains, the discrimination is even more apparent. The "store" as a unit is a mere abstraction. As a common denominator for taxing the marketing privilege it means no more than the use of the "pound" as a unit of taxing the privilege of selling all commodities, applicable alike to wheat, nails and diamonds.

In the *Liggett* case, *supra,* there was no record overthrowing the validity of the "store" unit as the exclusive common measure for the tax as between kinds of chains. The validity of acting on that ground of difference does not emerge from the mere sanction in that case of the general principle that chains may be taxed more heavily than independents. It is one thing to hold that every kind of chain has a peculiar quality, distinguishing it from independently-operated establishments in the same field and justifying a higher charge. It is quite another to hold that the "store" basis is adaptable to a general tax on all

kinds of chains when the facts in the record show the contrary.

In the present situation it is said that "all members of a class within the same graduated levels" are subjected to the same rule of taxation according to numbers of units. Because the businesses are characteristically different, the taxation of all kinds of chains, including filling station chains, according to that same rule is in practical effect taxation according to an unequal rule. There is a wide difference between the relation of numbers of units to taxable value in the filling station chains and the relation of numbers of units to taxable value in the general commodity chains.

> "* * * Substantial equality and fair equivalence are important factors in determining the presence or absence of arbitrary discrimination in such situations; * * * Mathematical equivalence is neither required or obtainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens."
>
> *Concordia Fire Insurance Company* v. *Illinois*, 292 U. S. 535, 547.

The taxation by a single rule of chains dissimilarly situated, when substantial rates are involved, results in a substantial inequality to filling station chains.

C. An incidental motive of repressing existing chain systems is supported neither by legislative declaration, nor by proof, nor by the circumstances under which the Act was passed.

It is not the province of the courts to speculate as to the incidental motives involved in the enactment of a tax measure.

What was the incidental motive of the legislature in the enactment of this statute? Was it actually to force an abandonment or reduction in the number of units in existing chains? Was it to discourage or suppress the further extension of these existing systems of retail distribution? Or, was it only to equalize the opportunities of doing business for independents by placing a tax on chains roughly proportioned to the greater value of the privilege enjoyed by them in West Virginia? Who can say, with certainty, as to the first two? In the absence of legislative declaration, or record proof, is it possible to assume that the motive was anything more than the usual one in revenue measures to impose charges according to taxable attributes of those subjected to the statute?

The Court has held in all prior chain store tax litigation that it cannot speculate as to the existence of an incidental motive to suppress or repress chain businesses. The theory of the decision in the *Jackson* case, 283 U. S. 527, 533, 537, 544, was to treat the Indiana statute as a revenue measure, pure and simple. The same was true of the Florida statute. *Liggett* v. *Lee,* 288

U. S. 517, 535, 536. Here, as in these prior cases, the argument that the statute was an exercise of the police power, as well as of the taxing power, with the incidental motive of suppression or repression, was but "faintly urged" by the tax commissioner. This was an issue upon which appellant offered no proof.

In the *Jackson* case, 283 U. S. 527, 537, the Court said that "it is not the function of this court in cases like the present * * * to seek for the motives * * * which prompted the adoption of the legislation." In the *Liggett* case, 288 U. S. 517, 535, the Court again said: "Assuming power to suppress by taxation a form of organization deemed inimical to the public interest, we can attribute no such motive to the present statute in the absence of legislative declaration or record proof." In the *Liggett* case it was determined that a progression on the county line basis bore no relation whatsoever to the "value of the privilege enjoyed" and was invalid. The Court now makes a clear departure from these cases and says that an inordinate tax is justified on the ground of an undeclared and unproven motive to discourage multiplication of units. Continuing its discussion of the motive behind the tax the Court says that in principle there is no distinction between this case and the *Magnano* case. If that be true, it is plain, transparently so, that the possible social and economic purposes have no place in the determination of the validity of the present tax, for in the *Magnano* case this Court said:

> "The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else."

Petitioner asserts that in principle there is a plain distinction between the *Magnano* case and the case at bar. There the legislature selected a specific subject for taxation. There was no attempt to create a class, and consequently no opportunity for unequal treatment of the members of the class.

Petitioner deduces from the language of the opinion here that the Court continues to recognize as an abstract principle that undeclared collateral motives of the legislature are beyond judicial inquiry, but it is the conviction of the petitioner that it is only upon the speculative assumption that the legislature acted out of a desire to repress chain systems as inimical to the public interest, that this Act can be said to bear any relation to its object. It is only from this viewpoint that the Court can ignore the undisputed proof, and the findings of the district court, that the classification which assimilates commodity chains and filling stations is in total disregard of the principle that the value of the privilege must be considered. And even if the assumed incidental purpose be given full weight, it lacks force in this case. Where the legislature purports to place all kinds of chains in a general class for similar repressive treatment, the basis for the graduation does not bear a "reasonable and just relation to the object" when in fact only one kind of chain is repressed and all others remain relatively untouched. Even to accomplish a regulatory purpose the Act must operate generally in the same way on all classes of chain organizations subjected thereto.

It is not the function of this Court to specify proper bases for legislative action. But it is known that there

are bases affording an "equal rule" for repressing all kinds of chains generally if that is clearly the legislative object. It is also known that an "equal rule" for the purpose of raising revenue without repression can be formulated so as to approximate roughly the value of the privilege enjoyed by all kinds of chains. Perhaps, the experience of legislatures in time will reveal other valid bases not yet tried, either for the purpose of taxation or repression. While value is not the sole basis for a revenue measure, a rational relation to value is a reasonable requirement for such a tax. *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 61, 83. And, when the incidental motive of repression is not properly shown, the legislative conception in fixing a tax based on numbers of units must have been roughly to tax according to the value of the privilege enjoyed by the various groups of taxpayers affected. *State Board of Tax Commissioners* v. *Jackson; Liggett* v. *Lee,* both *supra.* And, if the presumption attending the validity of the legislative scheme is overthrown by a factual foundation of record, the Act must fall. *O'Gorman & Young* v. *Hartford Fire Insurance Company,* 282 U. S. 251.

From the face of this Act the only legitimate assumption is an object to raise revenue. Not only that, the extrinsic circumstances surrounding its passage show that it was but one of many measures enacted in 1933 to offset losses from direct taxes on property resulting from the adoption of a tax limitation amendment to the state constitution. This was fully developed in the opinion of the district court. (Record, 256-260.) There is no basis for assuming an incidental motive to repress. When the sole object of the statute is to raise revenue by roughly

approximating the value of the privilege enjoyed by classes of taxpayers, as is the case here, persons entitled to invoke the equal protection clause of the Constitution should be able to look to this Court to invalidate a tax measure, based solely on number of units, which the record demonstrates does not bear a "reasonable and just relation" to that object. *Liggett* v. *Lee,* 288 U. S. 517, 533-5.

D. The Court determines that a series of filling stations under single ownership has the benefit of chain operation so as to render it subject to the chain store tax, notwithstanding that it finds that single and multiple stations are parts of a common system.

Petitioner has never denied that its system of stations may properly be termed a chain. Neither has it denied that certain of the benefits of chain store distribution are present in its operations. Nowhere in brief or argument has petitioner "picked out one feature of management after another" from the enumeraton in the *Jackson* case and denied their application to its own business. Petitioner, however, has asserted, consistently, from the filing of the bill of complaint to this time, that these advantages are not the result of the acquisition of its system of retail outlets, and that in the business of service station operation these characteristics do not distinguish the multiple stations from the single stations. As a consequence thereof it contends that a series of stations is not subject to a different measure of taxation from stations in separate ownership. This Court now says that on this point the district court held in favor of the state. Petitioner

does not understand this to be true. Judge Chesnut speaking for that court said:

> "And the somewhat elaborate stipulation of facts in the case very clearly leads to the conclusion that the combined characteristics which feature the typical chain store system and which have served as a basis for special classification for purposes of taxation do not inhere in multiple ownership or control of filling stations as compared with individual or independent ownership and operation of a single filling station." (R. 268)

This Court says that in arriving at the view that a series of stations is a different taxable species from single stations it is significant that the multiple stations fix the retail price and set "the pace". The essential justification heretofore made for the separate classification of chain stores is that they are assumed to enjoy the advantages of chain distribution *to the exclusion of single stores.* Every circumstance in the gasoline distribution business, and, as petitioner sees it, the very language of this Court, indicates that in that business the "chain" stations and the single stations are integral *parts of a common system,* all enjoying the marketing advantages of chain distribution. Whether the single stations adopt these advantages willingly, or, as the Court intimates, they are driven to adopt them, is in petitioner's view beside the point. The fact is that the company controlled stations and the single stations are in a common league, all enjoying the advantages of abundant capital, warehousing, standardized systems and advertising and other incidents of large scale distribution. Consequently, as Judge Soper pointed out, there is no evidence of economic hostility between the owners of single stations

and "the numerous gasoline and oil stations which oil companies of national scope have established and maintained in every section of the country." (R. 259)

It is for these reasons that petitioner has earnestly insisted, and urges now, that in the filling station business there is no substantial ground for taxing the single station at a nominal rate and the so-called chain station on a prohibitive basis. Petitioner does not believe the grounds for distinguishing the chain stores from single stores as laid down in the *Jackson* and *Liggett* cases are controlling as to service stations.

II.

Your petitioner respectfully says that, in holding the filling stations and bulk distributing plants to be "stores" within the meaning of the Act, the Court disregards the body of public thought with reference to "chain stores".

There is no reasonable doubt that the statute is directed at the *kind of place* where goods, wares and merchandise are sold, and not to the character of the merchandise. It is clear that the essential aim of the statute was to place a tax burden on chain stores. To test the purpose of the statute by the literal meaning of the words of Section 8 is to lose sight of the actual and primary intention of the legislature. It must have intended to reach the same kind of establishments which people generally have in mind when thinking of chain stores. This Court now says that

gasoline and other petroleum products are goods, wares and merchandise, and that this "satisfies the test of the statute." The petitioner is substantially reinforced in its position by the fact and the finding of the district court that there is no body of public thought which associates filling stations with the chain commodity stores.

The reason for this is clear. This record shows that prior to the establishment of filling stations by the companies, gasoline was distributed by garages and repair shops. The companies were the pioneers in the filling station business and the controversy over the alleged displacement of the local merchant has had little or no application to that business. Thus the Federal Trade Commission, although directed by the Senate of the United States to investigate every phase of the chain store problem (S. R. 244, 70th Cong.) deliberately omitted filling stations from its consideration "because of the apparent intent of the inquiry." (Sen. Doc. 31, 72d Cong. 1st Sess.)

Where there is clearly no public thought to sustain the position that chain filling stations are chain stores, petitioner respectfully urges, contrary to the holding of this Court, that the popular meaning of the statutory language is entitled to very great consideration in determining the legislative intent and meaning.

And, however all this may be as to the filling stations, petitioner respectfully urges that the bulk plants are clearly beyond the reach of the statute. This Court apparently agrees that the places covered by the statute must be establishments for the selling of goods. The bulk plants, which are essentially storage depots, are brought

into the statute by this Court on the ground that they are used "in part as a source of supply from which deliveries can be made to buyers."

It seems that this determination by the Court is far from the legislative intent which was to tax places in which goods are sold. If the present language of the Court is to prevail, then every warehouse and every establishment from which goods are delivered is a "store" and taxable under the Act.

Petitioner has urged an interpretation of the language of the statute which is in accord with popular understanding and which is in harmony with the public thought regarding chain stores.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, and that the decree of the district court be upon further consideration affirmed.

Respectfully submitted,

H. D. RUMMEL,
DONALD O. BLAGG,
A. G. STONE,
Counsel for Appellee.

February 7, 1935.

Certificate of Counsel.

I, H. D. RUMMEL, counsel for the above-named Standard Oil Company of New Jersey, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

H. D. RUMMEL
Counsel for Appellee.

7

SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1934.

Fred L. Fox, in his individual right and in his official capacity as Tax Commissioner of the State of West Virginia, Appellant, *vs.* Standard Oil Company of New Jersey, Appellee.	Appeal from the District Court of the United States for the Southern District of West Virginia.

[January 14, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy hinges upon the meaning and validity of the chain store license tax of West Virginia in its application to distributing plants and service stations for the sale of gasoline and kindred products.

On March 8, 1933, the legislature of West Virginia passed a law whereby all persons and corporations operating or maintaining a store as therein defined were required to obtain an annual license from the state tax commissioner. The license fee was graduated according to the number of stores. Upon one store the fee was to be $2; upon two stores or more, but not to exceed five, the fee was to be $5 for each additional store; upon six or more, but not to exceed ten, $10 for each additional store; upon each store in excess of ten, but not to exceed fifteen, $20; upon each in excess of fifteen, but not to exceed twenty, $30; upon each in excess of twenty, but not to exceed thirty, $35; upon each in excess of thirty, but not to exceed fifty, $100; upon each in excess of fifty, but not to exceed seventy-five, $200; and upon each in excess of seventy-five, $250.

Appellee, complainant in the court below, is a Delaware corporation, engaged in the business of refining, transporting and distributing petroleum products. It owns or controls in West Virginia 949 service or filling stations, and 54 bulk plants, a total of 1003. Of the 949 stations, there are 101, which are described as "company owned"; these are both owned and operated by the

complainant itself. "Leased outlets", 388 in number, and "vending privilege outlets", 460 in number, are leased by the complainant and operated by agents under commission contracts. By concession its control over these outlets is so complete as to amount to operation within the meaning of the statute. Finally there are 54 "bulk or distributing plants", maintained chiefly for the storage of petroleum products to be distributed to the stations, but in part as a source of supply from which deliveries are made to buyers.

Chains for the sale of gasoline have units many times more numerous than chains for other purposes. The longest "general commodity" chain is that of the Great Atlantic & Pacific Tea Company with 198 stores within the boundaries of West Virginia. Not only are the gasoline units more numerous, but the sales from any one unit are, comparatively speaking, small, as must always be the case when subdivision is so minute. The result is to cast upon the complainant and upon competing chains in the same business a burden much heavier, both absolutely and relatively to earnings, than any that is borne by others. This is brought out clearly through statistical tables in the record. The store license fees from all sources during the year 1933 amounted to $569,693. Of this total, stores other than gasoline stations contributed $83,525 (single stores $21,723, and multiple stores $61,802). Single gasoline stations, maintained by independent dealers, 2,000 in number, contributed $5,000, and chain gasoline stations $481,168, or 84.46% of the whole. Five oil companies including the complainant paid $476,171 or 83.5%, and the complainant alone paid $240,173 or 42.16%. Other tables supply the data for a comparison between the business done by the gasoline chains and that of chains for other purposes. If we look to the year 1932, the latest year for which complete figures are forthcoming, 2,453 gasoline chain stations did an aggregate business of $15,198,638, or 4.6% of the total chain business of the state, yet they would have paid 84.46% of the tax if the law had been in force during that year; 1,889 general retail stores in chain organizations did a total business of $75,454,257, or 22.9% of the whole, and would have paid 10.7% of the tax, this because the number of the units was relatively small. In 1932 the average gross revenue of the complainant's gasoline stations was $26,822 for each of the company owned stations, and

$3,892 for each of the agency stations, the company owned stations making by far the better showing. During the same year the average net income for company stations was $1,782.78 (it had been more than double in 1931), and for agency stations only $89.75. Upon that basis a tax of $250 would have left a profit for the one group, but a loss for the other. In the computation of this loss, a word may be of use as to the bookkeeping methods in vogue in the complainant's business. The complainant's practice has been to bill the gasoline to its stations at the current market prices, as if there were a sale to strangers. Such a mode of segregation, unless corrected by other data, will give at times a partial picture of the economic situation. If the price at which the oil is billed includes a reasonable profit for refining and transporting, the business may show a gain when viewed in all its parts, though the later work of marketing is carried on at cost or less. Stations scattered far and wide address a mass appeal to customers, and thus stimulate them to buy at the sign that has made itself familiar. True, the complainant lost money in the process of refining from 1930 to 1933, but for anything that is shown, the loss had its origin in the general economic depression prevailing in those years. Even so, there can be no denial that service filling stations, when organized in chains, bear a heavier and harsher burden than chains whose units are fewer and yet individually larger.

Impatient of that burden, the complainant brought this suit in June, 1933, to restrain the State Tax Commissioner from paying into the treasury of the state the sum of $240,173.50 paid under protest as the license taxes of the year. The reason for resort to equity was the uncertainty as to the existence of any remedy at law for the recovery of the taxes when once the moneys were deposited in the treasury, and subjected thereby to the state's ownership and power. In its bill of complaint the complainant took the ground that the exactions were illegal, first, because the gasoline stations were not stores within the meaning of the statute, and, second, because even though they were, the imposition of taxes was a denial to the complainant of immunities secured by the equal protection clause and the due process clause of the Fourteenth Amendment, and also by provisions of the constitution of the state. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), heard

the complainant's application for interlocutory and permanent relief. The court decided, after a careful review of the West Virginia statutes, that there was an imperfect remedy at law which made permissible resort to equity. In that conclusion we concur. The court decided also that the operation of the tax in its application to chains of gasoline stations was so much harsher and heavier than the operation of the tax when applied to other chains as to constitute a denial to the complainant of the equal protection of the laws. Finally the court decided that gasoline stations were not stores within the meaning of the statute. 6 F. Supp. 494. The decree enjoined the payment of the contested fees into the treasury of the state, and ordered restitution. An appeal to this court followed.

First. The filling stations and distribution plants are stores or mercantile establishments within the meaning of the statute.

By § 8, "the term 'store' as used in this act shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained and/or controlled by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind, are sold, either at retail or wholesale."

There is no doubt that goods, wares and merchandise of a kind, i. e., gasoline and other petroleum products, and even tires and other automobile accessories, are sold by the complainant and its agencies at its plants and service stations. This satisfies the test of the statute, and subjects the seller to the tax. We are told that the average man if requested to point out to a stranger the store nearest by or even the nearest mercantile establishment would not be likely to think of a filling station as within the range of the inquiry.* *Wadhams Oil Co.* v. *State,* 210 Wisc. 448; 245 N. W. 646, 649; also 246 N. W. 687. There might be force in this suggestion if the statute had left the meaning of its terms to the test of popular understanding. Instead, it has attempted to secure precision and certainty by rejecting a test so fluid and indeterminate and supplying its own glossary. The goods offered for sale are to be understood as having reference to goods "of any kind," and the place at which the sale is made shall include not only

*Filling stations are ranked as stores by students of the chain store problem: Zimmerman, The Challenge of Chain Store Distribution, p. 52.

places that in the common speech of men would be designated as stores, but, broadly speaking, any mercantile establishment, whether a store or something else. In such circumstances definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. Cf. *Midwestern Petroleum Corp.* v. *State Board of Tax Commissioners,* 187 N. E. (Ind.) 882. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.

Extrinsic tokens of intention, however, are not lacking altogether, and though their force may not be great, they point us the same way. In the passage of the bill through the Senate, an amendment was proposed whereby the definition of a store in § 8 was to be supplemented by the following proviso: "Provided, however, that the term 'store' shall not include filling stations engaged exclusively in the sale of gasoline and other petroleum products." The amendment was put to a vote and rejected. What was done in that connection is doubtless not conclusive as to the meaning of the bill in the unamended form. *Murdock* v. *City of Memphis,* 20 Wall. 590, 618. It is, however, a circumstance to be weighed along with others when choice is nicely balanced. *Finlayson* v. *City of Shinnston,* 113 W. Va. 434, 437; cf. *United States* v. *United Shoe Machinery Co.,* 264 Fed. 138, 174; *Lapina* v. *Williams,* 232 U. S. 78, 89. Reinforcing this token is the contemporaneous interpretation of the statute by the Tax Commissioner of the state, the administrative agent charged with its enforcement. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378. We give to such construction "respectful consideration," though we have power to disregard it. *United States* v. *Moore,* 95 U. S. 760, 763; *Fawcus Machine Co.* v. *United States, supra.* The complainant was at liberty to maintain a suit in the state courts, where the meaning of the statute could have been determined with finality. It chose to have recourse to the courts of the nation. In such circumstances we are charged with a duty of independent judgment (*Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, 194; *Hurn* v. *Ousler,* 289 U. S. 238, 243), but in default of other tests, we lean to an agreement with the agents of the state.

Second. The statute in its application to the complainant and others similarly situated does not deny to the taxpayer the equal protection of the laws.

The inquiry divides itself into two branches which call for separate consideration. Is a series of filling stations a chain of such a kind as to be subject to a different measure of taxation from stations in separate ownership? This question was answered by the court below in favor of the state, but it is still pressed in this court by counsel for the complainant. If the stations in a chain may be taxed differently from independent units and the amount of the tax fixed upon a graduated basis, is the graduation in its consequences so extreme, so disproportionate to benefits, as to be an arbitrary discrimination between longer chains and shorter ones, or between chains for the sale of gasoline and for the sale of other products? This question was answered by the court below in favor of the taxpayer.

(1) We think a series of gasoline stations maintained in a single ownership has the benefit of chain organization in such a sense and measure as to fall within the scope of the decisions of this court in *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, and *Liggett Co.* v. *Lee*, 288 U. S. 517. The opinion in Jackson's case enumerates some of the advantages of chain store operation, and finds a sufficient basis for taxing chains differently from stores separately owned. The opinion in Liggett's case makes it clear that the list of benefits was for illustration only, but that in every "integrated chain", whatever its particular quality, there is something constant and distinctive which marks it off from stores maintained in separate ownership, and even from those combining in coöperative leagues. 288 U. S. at p. 532. The complainant in this suit returns to the same method of attack, picking out one feature of management after another from the list in Jackson's case, as if what was enumerated there were a code to which every chain is to conform if it is to be subject to taxation in accordance with a special system. The method is deceptive, yet many of the chief benefits found in the structure of other integrated chains will be discovered to be present here.

We have here abundant capital; standardization in equipment and display; superior management; more rapid turnover; uniformity in store management; special accounting methods; and a unified sales policy coördinating the diverse units. The complainant receives the crude oil from a subsidiary company, which produces one-third of what it sells and buys two-thirds from others, these others, for all that appears, being affiliated corporations. The

oil when delivered is refined by the complainant, and then billed to itself, that is to its stations and agencies, at current market rates. Through all these far flung instruments it distributes its own products and spreads through every hamlet its repute as a distributor. Ownership or control of a host of well-appointed depots, uniform in design and color, has put the chains in a position to bring home to the consuming public the knowledge of their wares and of the quality of their service in a way far beyond the capacity of the independent dealer with one station or a few. The mere statement of the number of depots maintained by the complainant —1,000 separate centres of attraction and distribution—must bear persuasive witness to the tremendous potencies of advertisement, of reiterated suggestion, inherent in a business conducted on such a scale. The results confirm the prophecy. There are 4,453 filling stations in West Virginia. Of these only 55% are members of a chain, yet this 55% has been able to make 75% of the sales of motor fuel. True the complainant has been willing to loan its distinctive labels and equipment to independent operators dealing in its products, and even to paint their stations so that they will seem to be its own. This practice has been discontinued since the passage of the National Recovery Act and the adoption of a code thereunder. Even before that time, however, the gasoline was billed to independents at a price one-half cent per gallon higher than the price payable by agencies acting on a commission basis. The discrimination may mean the difference between a profit and a loss. More important is this, that the effect of multitudinous agencies, reaching into every corner, and yet subject to regulation at a centre, is to fix a uniform retail price to which independents must conform as the price of their existence. They are independent in name only, for the chain sets the pace, and even in competing they are subject to its mastery. They are reminded every hour that a chain efficiently conducted, with ample capital behind it, is able to attract the public in a degree impossible for others. Indeed, some of them are driven to pose as members of the chain by borrowing its insignia in order to share its popularity. The popularity would be unattainable without a multiplicity of units repeating the same message.

(2) Chains of gasoline stations being subject like other chains to a graduated tax, the question remains whether the rates are so

oppressive as to amount to arbitrary discrimination or to unlawful confiscation.

When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in *Magnano Co.* v. *Hamilton*, 292 U. S. 40, decided at the last term. "Even if the tax should destroy a business, it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk." *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48, quoted in *Magnano Co.* v. *Hamilton, supra*, p. 46. True the reservation was made (292 U. S. at p. 44) that an act might be so arbitrary as not to be an exercise of the taxing power at all, the form of a tax being a cloak for something else. Cf. *Child Labor Tax Case*, 259 U. S. 20. In respect of the challenged act, there is neither evidence nor even claim of any such abuse. On the contrary, the complainant has stated in its bill that the "act is, in effect, a tax measure," its validity or invalidity to be adjudged upon that basis. A chain, as we have seen is a distinctive business species, with its own capacities and functions. Broadly speaking its opportunities and powers become greater with the number of the component links; and the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held, *State Board of Tax Commissioners* v. *Jackson, supra; Liggett Co.* v. *Lee, supra.* Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126; *Sproles* v. *Binford*, 286 U. S. 374, 394; *Stephenson* v. *Binford*, 287 U. S. 251. In principle there is no distinction between such an exercise of power and the statute upheld in *Magnano Co.* v. *Hamilton, supra*, whereby sales of butter were fostered and sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence. "Collateral purposes or motives of a legislature in

levying a tax of a kind within the reach of its lawful powers are matters beyond the scope of judicial inquiry." *Magnano Co.* v. *Hamilton, supra,* at p. 44; *McCray* v. *United States,* 195 U. S. 27, 56. The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only.

The argument against the statute rings the changes upon a comparison between the position of the gasoline chains and that of chains for other products. The gasoline chains,* as already noted in this opinion, have units more numerous by far than those that deal in other things, and because of their size must pay a large percentage of the tax, though it is not to be forgotten that there are general commodity chains also within the upper brackets. The outcome is no evidence of an arbitrary discrimination, defiant of the restraints of law. All members of a class within the same graduated levels are treated impartially and subjected to an equal rule. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293, 296. If only one form of chain chooses so to multiply its units, after arriving at the topmost levels, as to make the burden heavy, it owes its position on the scale and the aggravation of the tax to the exigencies of business and not to those of law. The classification is not arbitrary, but in its normal operation has a rational relation to the subject matter to be taxed, the capacity to pay, and the justice of the payment. Cf. *Magoun* v. *Illinois Trust & Savings Bank, supra; Knowlton* v. *Moore,* 178 U. S. 41, 54; *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61; *Lake Shore & Michigan Southern R. Co.* v. *Clough,* 242 U. S. 375, 385; *Maxwell* v. *Bugbee,* 250 U. S. 525, 540, 541; *Watson* v. *State Comptroller,* 254 U. S. 122, 124; *State Board of Tax Commissioners* v. *Jackson, supra,* at p. 537. We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the con-

*The Standard Oil Co. of New Jersey, Sinclair Refining Co., Ashland Refining Co., Pure Oil Co., and Gulf Refining Co.

sequences must be accepted as inherent in government by law instead of government by edict.

Third. The statute does not violate the constitution of West Virginia which requires that taxation shall be equal and uniform throughout the state. Article 10, § 1.

The constitution of Indiana has a like provision which was considered by this court when sustaining the chain store tax in *State Board of Tax Commissioners* v. *Jackson, supra,* at p. 542. The view was expressed that the standard of uniformity under the constitution of the state was substantially the same as the standard of equality under the Fourteenth Amendment of the constitution of the nation.

Not finding that the courts of West Virginia have spoken on the subject differently, we reach the same conclusion now. *Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298, 305. Cf. *Laing* v. *Fox,* 175 S. E. (W. Va., 1934) 354, 359; *Hope Natural Gas Co.* v. *Hall,* 102 W. Va. 272; *Pipe Line Co.* v. *Hallanan,* 87 W. Va. 396; *Commonwealth of Virginia* v. *Bibee Grocery Co., Inc.,* 153 Va. 935; *Great Atlantic & Pacific Tea Co.* v. *Maxwell,* 199 N. C. 433; *Moore* v. *State Board of Charities & Corrections,* 239 Ky. 729; *Standard Lumber Co.* v. *Pierce,* 112 Oregon 314.

Fourth. What has been said in respect of the contention that the tax has the effect of an arbitrary discrimination is a sufficient answer to the contention that property has been taken without due process of law.

The decree is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER, accepting the opinion and concurring opinion of the court below as embodying a sound and correct view of the law applicable to the first and second points discussed in the opinion just delivered, think the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.